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# Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Response and Reaction in the Federal Judiciary

Alfred S. Neely IV  
*University of Missouri School of Law*

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# VERMONT YANKEE NUCLEAR POWER CORP. V. NATURAL RESOURCES DEFENSE COUNCIL, INC.: RESPONSE AND REACTION IN THE FEDERAL JUDICIARY

Alfred S. Neely, IV†\*

*In Vermont Yankee, The United States Supreme Court established a paradigm for judicial review of administrative agencies' rulemaking actions. The Court held that Congress had established the maximum procedures that may be required of an agency undertaking informal rulemaking. These procedural requirements were established by section 553 of the Administrative Procedure Act, and courts generally are prohibited from imposing additional procedures upon agencies. Since the 1978 opinion was handed down, the lower federal judiciary has been exploring the possible implications of the Vermont Yankee rule. The author surveys the lower court opinions, and concludes that this lower court exploration has produced two results. First, lower courts can sidestep Vermont Yankee in three ways: by use of their power to substantively review the rulemaking record, by refusing to accept agencies' characterization of some rules as exempt from the notice and comment requirements of section 553 of the Administrative Procedure Act, and by developing the "constitutional constraints or extremely compelling circumstances" exception which the Court explicitly created in Vermont Yankee. The author calls upon the Supreme Court to close these paths of escape from the Vermont Yankee mandate by acting to more finely develop the precise nature of the judiciary's role in the review of informal rulemaking. Second, the author notes that the lower federal judiciary has improperly extended application of Vermont Yankee to review of agency adjudication, and asks the Court to clarify its stand on the relationship between Vermont Yankee and administrative action beyond the sphere of administrative rulemaking.*

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† Edward W. Hinton Professor of Law, University of Missouri-Columbia; A.B. 1963, Yale University; LL.B. 1966, Harvard University.

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## I. INTRODUCTION

In 1978, the Supreme Court of the United States issued its opinion in the case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>1</sup> The Court's decision reversed two prior rulings of the Court of Appeals for the District of Columbia Circuit,<sup>2</sup> triggered extensive commentary in the legal literature,<sup>3</sup> and apparently declared an end to a species of judicial activism in the review of agency rulemaking.<sup>4</sup> *Vermont Yankee* was immediately recognized as an important case with at least prospects of significant impact.<sup>5</sup>

The purpose of this article is to consider the response and reaction of the lower federal judiciary to *Vermont Yankee*. Today, six years after the Court's decision, sufficient time has passed to discern something about the nature and quality of that response and reaction. This in turn affords the opportunity to assess the efficacy of the Court's leadership in judicial review of administrative rulemaking.

## II. VERMONT YANKEE

### A. The Decision

*Vermont Yankee* arose out of the technically complex and politically volatile issue of licensing nuclear power facilities. The corporation had successfully obtained the requisite construction and operating licenses from the Atomic Energy Commission (Commission);<sup>6</sup> in granting the licenses the Atomic Safety and Licensing Board had refused to consider

1. 435 U.S. 519 (1978).

2. *Aeschliman v. United States Nuclear Regulatory Comm'n*, 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

3. See generally *infra* text accompanying notes 23-40.

4. See generally *infra* text accompanying notes 6-22.

5. The number of casebooks in administrative law which now include *Vermont Yankee* provides some evidence of consensus on the significance of the case. See, e.g., S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 516-22 (1979); W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 192-201 (7th ed. 1979); J. MASHAW & R. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM* 53-61 (Supp. 1980); D. ROTHSCHILD & C. KOCH, *FUNDAMENTALS OF ADMINISTRATIVE PRACTICE AND PROCEDURE* 372-78 (1981); B. SCHWARTZ, *ADMINISTRATIVE LAW* 289-95 (2d ed. 1983).

6. In 1974 the licensing and other regulatory activities of the Atomic Energy Commission were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233.

issues pertaining to the spent fuel cycle, and specifically, fuel reprocessing and disposal of reprocessing wastes. The Natural Resources Defense Council (NRDC) objected to this; however, the Atomic Safety and Licensing Appeal Board, the administrative appellate tribunal with the responsibility for reviewing the initial decision, affirmed the grant of license.<sup>7</sup>

Nevertheless, the Commission did not ignore the issue of spent fuel disposal. Shortly after the decision concerning Vermont Yankee's license, it initiated a rulemaking proceeding to consider the subject.<sup>8</sup> It is noteworthy that in this proceeding the Commission did not limit procedural opportunities to the requirements of the Administrative Procedure Act (APA).<sup>9</sup> Under the APA, informal rulemaking is required to be conducted in accordance with certain basic and relatively simple procedural requirements. The statute provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . ." and that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."<sup>10</sup> Furthermore, it requires that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."<sup>11</sup> The nature of this procedural pathway has resulted in its characterization as "notice-and-comment" rulemaking.

These were the basic procedural requirements that the Commission elected to exceed in its spent fuel disposal rulemaking proceeding. Although not required, the Commission held a hearing. In advance of the hearing it made certain background documents available to the public, and announced that participants would be given a reasonable opportunity to present their positions and, time permitting, oral as well as written statements. In addition, it indicated that a transcript would be available and that the record would be open for a thirty day period for filing of supplemental statements.<sup>12</sup> In these and other respects, the procedural opportunities afforded interested persons went far beyond the provisions of the APA.

Nonetheless, there was dissatisfaction with the procedures employed because the Commission had refused the request of the NRDC that adjudicatory procedures be utilized, and especially the request that cross-examination and discovery be allowed.<sup>13</sup> Consequently, the NRDC turned

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7. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526-28 (1978).

8. *Id.* at 528-30.

9. 5 U.S.C. §§ 551-706 (1982).

10. *Id.* § 553 (a)-(c).

11. *Id.* § 553(c).

12. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 528-30 (1978).

13. *Id.* at 529.

to the judiciary for review of the Commission's rulemaking procedure as well as other issues surrounding the licensing of the Vermont Yankee facility.

In 1976, the Court of Appeals for the District of Columbia Circuit decided whether the rulemaking procedures used were legitimate and adequate.<sup>14</sup> The court concluded that the proceeding was procedurally defective, notwithstanding compliance with the basic requirements of the APA, and remanded the matter to the Commission for further proceeding.<sup>15</sup> The United States Supreme Court granted certiorari to review the court of appeals's decision. The Court was motivated by its "concern that they had seriously misread or misapplied . . . statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress."<sup>16</sup> The lower court's determination of the inadequacy of the Commission's rulemaking procedures violated the Supreme Court's perception of basic principles governing the relationship between administrative agencies and the judiciary. It noted:

Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the [APA]. But such circumstances, if they exist, are extremely rare.<sup>17</sup>

Consequently, the Court rejected the NRDC's contention that the procedural requirements of the APA for informal rulemaking constitute only "lower procedural bounds" which a court may require an agency to go beyond "when an agency's proposed rule addresses complex or technical factual issues or 'Issues of Great Public Import'."<sup>18</sup>

In reaching this conclusion, the Court was not suggesting that lower courts were to do nothing in the control of administrative rulemaking. Among other things, there remained the matter "of whether the chal-

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14. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

15. Whether the court of appeals mandated additional procedures beyond those required by § 553 of the APA is open to debate. The Supreme Court found that it had, noting "we conclude that while the matter is not entirely free from doubt, the majority of the court of appeals struck down the rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 540-41 (1978).

16. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

17. *Id.* at 524.

18. *Id.* at 545.

lenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court,"<sup>19</sup> subject to the Supreme Court's warning that the lower courts should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."<sup>20</sup>

The relative clarity of the Court's pronouncement was nevertheless clouded by its suggestion that there might be circumstances in which a court could insist on added procedures in informal rulemaking, and the ambiguity of the suggestion itself created further uncertainty.

In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds,' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process . . . . It might also be true, although we do not think the issue is presented in this case and accordingly do not decide it, that a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.<sup>21</sup>

Yet the Court definitely had infrequent exceptions in mind, for it noted that "[t]his much is absolutely clear: Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "<sup>22</sup>

### B. Scholarly Reaction

Legal commentary on *Vermont Yankee* appeared soon after the Supreme Court's decision. These writings represent part of the intellectual climate in which the responses and reactions of the lower federal courts to *Vermont Yankee* have unfolded. They provide an indication of perceptions of the case, its meaning and significance, its desirability and its possible, if not probable, impact.

An early and important symposium, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives*,<sup>23</sup> appeared in the *Harvard Law Review* in June, 1978. In it, Professors Stewart, Byse, and Breyer of the Harvard Law School presented their reactions to the decision.

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19. *Id.* at 549.

20. *Id.*

21. *Id.* at 542 (footnote omitted) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1939)).

22. *Id.*

23. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives*, 91 HARV. L. REV. 1804 (1978).

Professor Stewart was unenthusiastic about the result: "[T]he Court announced the broad, novel, and important principle that federal courts may not, absent extraordinary circumstances, require federal administrative agencies to employ procedural formalities beyond those specified in the Administrative Procedure Act . . . or other relevant statutes. This principle is unsound."<sup>24</sup> This conclusion was founded on the view that the prohibition of "innovative judicial imposition of procedural requirements beyond those specified by the APA . . ."<sup>25</sup> drew upon an antiquated view of developments in administrative law. Thus, he observed that "*Vermont Yankee* is myopic in denying courts an adequate role in adjusting and updating the law, and instead leaving the entire responsibility to Congress and administrators."<sup>26</sup>

Professor Stewart did indicate, nevertheless, that there was a basis for mitigation of the adverse implications of the decision. First, he suggested that the "ban on procedural innovation by courts should be read as limited to the particular circumstances of generic rulemaking in nuclear power regulation, while its rebuking tone should be read more broadly to warn lower federal courts against going too far in using novel, ad hoc procedural requirements to force reconsideration of agency policies which judges view as questionable."<sup>27</sup> Furthermore, he thought that "the practical effect . . . will be to stimulate continued use of more moderate forms of hybrid procedure" because of the continuing requirement of an adequate record for purposes of judicial review,<sup>28</sup> with the additional possibility of "the salutary side effect of leading reviewing courts to engage in more open and explicit scrutiny of substantive agency policies, rather than resorting to indirect procedural devices to control outcomes."<sup>29</sup>

In contrast, Professor Byse saw the case as "a needed corrective to an unwholesome trend in the lower federal courts."<sup>30</sup> His support for the decision was "powerfully influenced by [his] conception of the respective institutional roles and responsibilities of the judiciary, the legislature and the administrative . . ."<sup>31</sup> Professor Breyer was similarly supportive of the decision. His principal point of disagreement was with the Court's remand of the case; he believed that the Court need not have done anything more than affirm the Commission's decision.<sup>32</sup>

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24. Stewart, *Vermont Yankee And The Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1805 (1978).

25. *Id.* at 1811.

26. *Id.* at 1820.

27. *Id.* at 1821.

28. *Id.*

29. *Id.*

30. Byse, *Vermont Yankee And The Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1823 (1978).

31. *Id.* at 1930.

32. Breyer, *Vermont Yankee And the Courts' Role In The Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1840 (1978).

The ultimate issue presented by *Vermont Yankee* is the proper role of the courts in the debate over nuclear power. Since that debate has been lively and effective in the political arena, and since one cannot reasonably argue that important health, safety, or environmental interests lie on only one side of that debate, the courts . . . should play a limited role, affecting as little as possible the outcome of that debate.<sup>33</sup>

Perhaps the most vehement criticism of *Vermont Yankee* has come from Professor Kenneth Culp Davis. He observed that "the *Vermont Yankee* opinion is largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority.'" <sup>34</sup> In his judgment "the main thrust of the opinion is to outlaw new common law that adds to the procedural requirements of section 553 of the APA," <sup>35</sup> and this runs counter to the reality that most administrative law is judge made and ignores a common law that has developed in harmony with the intent and terms of the APA. <sup>36</sup> His concerns, however, were alleviated by his prediction that the principles of *Vermont Yankee* would prove shortlived. <sup>37</sup>

Numerous others have commented on the case. Their views are as varied as those of the commentators just discussed, and generalization concerning them is somewhat hazardous without full development of their opinions. Nevertheless, some patterns of perception of the case do emerge.

Many consider *Vermont Yankee* an important constraint on the ability of courts to impose procedural requirements in rulemaking beyond those established by Congress in the APA, and its importance is underscored by the judgment that the broad principles of the opinion transcend the ambiguities of the possible exceptions which it created. <sup>38</sup>

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33. *Id.* at 1845.

34. Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 17 (quoting K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:37, at 616 (2d ed. 1978)).

35. Davis, *supra* note 34, at 10.

36. *Id.* at 3, 12.

37. *Id.* at 3, 13-16; see Friendly, Book Review, 8 HOFSTRA L. REV. 471, 480-83 (1980) (reviewing K. C. DAVIS, 1 & 2 ADMINISTRATIVE LAW TREATISE (2d ed. 1979)).

38. See, e.g., Bain, *Informal Rulemaking: In Quest of Nuclear Licensing Reform*, 55 DEN. L. J. 177, 179, 209 (1978) (exceptional circumstances justifying courts' imposition of additional procedures on agencies are rare, especially in nuclear regulatory context); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 422 (1981) (a "broadside at the procedural creativity of lower federal courts in rulemaking cases."); Estreicher, *Pragmatic Justice: The Contribution of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 907 (1980) (the case "moots the Bazelon-Leventhal debate by holding the courts enjoy no common law authority to prescribe procedures, in addition to those required by the Constitution or applicable statutes, in the interest of effective judicial review."); Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation*, 30 AD. L. REV. 467, 491-92 (1978) (the case "redirects the current of development and possibly terminates judicial development of the law altogether."); McGarity, *Substantive*



Naturally this view assumes an obedient and willing lower federal judiciary.<sup>39</sup> Others have been more inclined to discount the ultimate signifi-

*and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L. J. 729, 752 (1979) ("The Court rejected Judge Bazelon's 'good procedures ensure good substance' approach and implicitly favored Judge Leventhal's more activist 'hard look' approach."); Scalia, *Vermont Yankee: The APA, the D. C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 395-96 ("It would go too far, however, to suggest that *Vermont Yankee* is anything less than a major watershed. It has put to rest the notion that the courts have a continuing 'common-law' authority to impose procedures not required by the Constitution in the areas covered by the APA. In that sense, at least, 'hybrid rule making,' under the APA is dead."); Schwartz, *Administrative Law Cases During 1978*, 31 AD. L. REV. 123, 127 (1979) (*Vermont Yankee* "aborted this line of cases" creating a trend toward judicial imposition of hybrid rulemaking procedures); Schwartz, *Some Recent Administrative Law Trends: Delegation and Judicial Review*, 1982 WIS. L. REV. 208, 215 (the "high bench has been unwilling to allow courts to impose requirements upon rulemaking not contained in delegating statutes"); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 290 (1978) ("But there is little need to speculate on the future of this process [hybrid rulemaking] since the Supreme Court in *Vermont Yankee* . . . has made it plain that lower courts have no power to expand APA informal rulemaking procedures as part of their function of judicial review."); Note, *Administrative Law — Reviewing Courts Restricted from Imposing Procedures for Informal Rulemaking Beyond Those Specified in Section 553 of the Administrative Procedure Act or Other Relevant Statutes*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), 28 CATH. U.L. REV. 411, 422 (1979) (the case reflects "the Court's desire to put an end to judicial activism through procedural review."); Note, *A Specific Proposal for Hybrid Rulemaking*, 7 COLUM. J. OF ENV'T. L. 69, 76 (1980) (the case "severely curtailed judicial use of remands to encourage agencies to employ procedures beyond those required by the APA"); Note, *Judicial Imposition of Rulemaking Procedures on Administrative Agencies: The Impact of Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 28 DEPAUL L. REV. 171, 186 (1978) (the case "will have far reaching effects on administrative procedure"); *Judicial Review of Administrative Agency Action — 1) Absent Compelling Circumstances a Reviewing Court May Not Require Informal Rulemaking Procedures That Exceed Those Required by Section 553 of the Administrative Procedure Act — 2) Agencies May Place Reasonable Limitations On The Consideration of Alternatives Proposed Under The National Environmental Policy Act*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), 19 SANTA CLARA L. REV. 799, 806-07 (1979) (the case's greatest significance lies in its reversal of the trend, especially apparent in the District of Columbia Circuit, toward requiring rulemaking procedures that are more elaborate than those required by section 553 of the APA); Note, *Administrative Law — Administrative Procedure — Notice and Comment Rulemaking*, 1979 WIS. L. REV. 314, 336 ("a strong mandate . . . telling the lower courts to stop 'meddling' with agency procedures"); cf. Beatson, *A British View of Vermont Yankee*, 55 TUL. L. REV. 435 (1981) (recognizes the significance of *Vermont Yankee* but suggests that its importance may be overestimated by other commentators); Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183, 202-06 (1979) (urging amendment of the APA to deal with the case, an unlikely event; in the interim pointing to the exceptions and remand for inadequate reasons as alternatives); Priew, *A French View of Vermont Yankee*, 55 TUL. L. REV. 465 (1981) (discussing possible reactions of French courts to a *Vermont Yankee* situation); Schoenbaum, *A Preface to Three Foreign Views of Vermont Yankee*, 55 TUL. L. REV. 428 (1981) (presenting the British, French, and Japanese reactions to *Vermont Yankee*.)

39. See, e.g., Scalia, *supra* note 38, at 396 ("a new tone for the decision of administrative

cance of the decision.<sup>40</sup> The evidence is ample that there is no consensus or clear direction in the legal literature concerning the significance and probable future of the principles of *Vermont Yankee*. The conflicting signals of the opinion itself in some measure contributed to this; the varying views as to the desirability of the Supreme Court's inclinations concerning the proper role of court and agency in rulemaking seem to have provided the rest. Yet, as all would concede, the true test of the significance of the principles of *Vermont Yankee* awaited subsequent refinement by the Supreme Court and their reception in the lower federal judiciary.

### III. RESPONSE AND REACTION IN THE FEDERAL JUDICIARY

Although the Supreme Court to date has not refined the principles of *Vermont Yankee* in any significant respect, it has on occasion confirmed its commitment to its fundamental principles. The case does appear to be firmly established as a benchmark in the relationship between court and agency in the formulation of rulemaking procedure.

In *Crysler Corp. v. Brown*,<sup>41</sup> the Court noted that in *Vermont Yankee* it had held that only in cases involving extraordinary circumstances would the courts be permitted to impose procedural requirements beyond those required under the APA.<sup>42</sup> It pointed out that agencies and not the courts possess the discretion to afford more than statutorily mandated procedures; however, in this case the issue was whether regulations that were procedurally defective could have the force and effect of law. In this context, the Court observed that the judiciary has both the authority and the duty to make certain that agencies comply with the statutory mandates of the APA.<sup>43</sup>

In 1983, the Court again considered *Vermont Yankee* in the context of rulemaking. *Baltimore Gas & Electric Co. v. Natural Resources De-*

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law cases — a tone of judicial restraint and great deference . . . if the D.C. Circuit deigns to follow it.”).

40. See, e.g., DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 316 (“a narrow ruling, despite its stinging language”); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L. J. 699, 713, 714 (1979) (“The serious implications of *Vermont Yankee* for hard look procedures, nonetheless, are unlikely to materialize;” the case “forbids a narrow form of appellate directive that is almost never used, perhaps not even in the case under review”); Recent Development, 9 ENVTL. L. 653 (1979) (“Due to the conflicting standards provided by the Court, the *Vermont Yankee* decision is unlikely to have a major impact on review of rulemaking proceedings.”). See also E. Gellhorn and Robinson, *Rulemaking “Due Process”: An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 214-15 (1981) (“The Supreme Court’s decision in *Vermont Yankee*, invalidating judicial imposition of special procedures on agency rulemaking, compounds the uncertainty, especially inasmuch as the decision itself has an unclear future.”).

41. 441 U.S. 281 (1979).

42. *Id.* at 312.

43. *Id.* at 312-13.

*fense Council, Inc.*<sup>44</sup> involved the return to the Court of a case which it had remanded for further consideration in the wake of *Vermont Yankee*.<sup>45</sup> On remand, Judge Bazelon concluded that the agency rules in question lacked support in the record and were invalid.<sup>46</sup> The Supreme Court disagreed and found that the agency, in assuming that permanent storage of nuclear wastes poses no significant environmental risks, was acting within the realm of reasoned decisionmaking.<sup>47</sup> Concerning *Vermont Yankee*, it noted:

this Court unanimously reversed the Court of Appeals' decision that the Commission had used inadequate procedures, finding that the Commission had done all that was required by NEPA and the APA and determining that courts generally lack authority to impose "hybrid" procedures greater than those contemplated by the governing statutes.

As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure.<sup>48</sup>

Yet the Court has also restated the point that *Vermont Yankee* is not without limits. In *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,<sup>49</sup> the Court concluded that the National Highway Transportation Safety Administration had been arbitrary and capricious in rescinding its vehicle crash protection standard, and stated:

Petitioners also invoke our decision in *Vermont Yankee* [citation omitted], as though it were a talisman under which any agency decision is by definition unimpeachable. Specifically, it is submitted that to require an agency to consider an airbags-only alternative is, in essence, to dictate to the agency the procedures it is to follow. Petitioners both misread *Vermont Yankee* and misconstrue the nature of the remand that is in order. In *Vermont Yankee*, we held that a court may not impose additional procedural requirements upon an agency. We do not require today any specific procedure which NHTSA must follow. Nor do we broadly require an agency to consider all policy al-

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44. 462 U.S. 87 (1983), *rev'g* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 685 F.2d 459 (D.C. Cir. 1982).

45. Baltimore Gas & Elec. Co. v. Natural Resources Council, Inc., 435 U.S. 964 (1978) (mem.); *see also* Long Island Lighting Co. v. Lloyd Harbor Study Group, Inc., 435 U.S. 964 (1978) (mem.).

46. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 685 F.2d 459, 494 (D.C. Cir. 1982), *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983).

47. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 104 (1983).

48. *Id.* at 92, 100.

49. 103 S. Ct. 2856 (1983).

ternatives in reaching decision.<sup>50</sup>

There is some indication that the Court does not intend to confine the principles of *Vermont Yankee* to rulemaking, although it has not focused on this issue. In *Costle v. Pacific Legal Foundation*,<sup>51</sup> the Court reemphasized the teaching of *Vermont Yankee* as "the fundamental administrative law principle" that formulation of administrative procedures is to be left primarily to the agencies.<sup>52</sup> The case concerned the validity of the EPA's administrative summary judgment rules for essentially adjudicatory proceedings. Informal rulemaking was not at issue. In a different case, in which the Court reviewed judicial imposition of mandatory deadlines on the adjudication of Social Security disability benefits, it declined to reach the contention that the deadlines improperly interfered with agency discretion to develop procedures for adjudication.<sup>53</sup> It did conclude, however, that the deadlines constituted an "unwarranted judicial intrusion," but not explicitly because of impermissible judicial interference with agency discretion in choosing procedure. The Court instead reasoned that Congressional awareness of the delay problem and repeated Congressional rejection of deadlines as a solution made the judicial imposition of deadlines unwarranted.<sup>54</sup>

The result is that there is no indication of retreat from the principles of *Vermont Yankee* on the part of the Court. The limited picture available is one of restatement and reassertion. Unfortunately, there also has been no development, refinement, or clarification of the ambiguities of the opinion. It remains unclear whether the Court intends *Vermont Yankee* to apply to administrative action other than rulemaking and what is the reach of the exceptions to the principles of the opinion. In contrast, there has been extensive response and reaction in the lower federal courts.<sup>55</sup>

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50. *Id.* at 2870-71.

51. 445 U.S. 198 (1980).

52. *Id.* at 214-15; see also *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 755 (1983) (Brennan, J., concurring) ("The scope of our review of the procedures the Board uses to accomplish its mission is limited, and the constitutional constraints on them are attenuated. Unless the agency goes entirely beyond its statutory mandate, violates its own procedures, or fails to provide an affected party due process of law, we have no role in specifying what methods it may or may not use in finding facts or reaching conclusions of law or policy."); *Heckler v. Lopez*, 104 S. Ct. 10, 13, *motion to vacate denied*, 104 S. Ct. 221 (1983) (Rehnquist, J.) (Grant of stay of preliminary injunction with instructions that it be evaluated in accordance with "familiar principles of administrative law" that procedures are to be left to the agencies. The case involved agency practices in termination of Social Security disability benefits.); cf. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (courts may not interject themselves into matters properly left to agency discretion).

53. *Heckler v. Day*, 104 S. Ct. 2249, 2257-58 (1984).

54. *Id.* at 2253, 2257-58.

55. Federal agencies have been predictably enthusiastic and have cited the case to justify denials of procedures in excess of those required under the APA or applicable statutes, including adjudicatory hearings, 48 Fed. Reg. 396 (1983) (CAB), 47 Fed. Reg. 26,982 (1982) (FDA), 46 Fed. Reg. 12,065 (1981) (FERC), 45 Fed. Reg. 51,520

### A. *The District Courts*

Generally, the reaction in the federal district courts has been one of respectful adherence to the fundamental principles and philosophic underpinnings of *Vermont Yankee*.<sup>56</sup> There is no significant evidence of resistance or inclination to disregard *Vermont Yankee*. Indeed, the district courts have tended to transport *Vermont Yankee*'s deference to administrative and legislative determinations of procedure from the context of informal rulemaking to other forms of administrative action.

In rulemaking, *Vermont Yankee* has caused the district courts to look to applicable statutes and agency regulations to determine required procedures. For example, in a simple case in which the rulemaking was informal and the agency elected to do nothing more than that required

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(1980) (CFTA), oral hearings, 45 Fed. Reg. 65,916 (1980) (OSHA), cross-examination, 45 Fed. Reg. 8509 (1980) (EPA), limits on ex parte contacts, 45 Fed. Reg. 35,582 (1980) (FCC), and separation of functions, 46 Fed. Reg. 24,694 (1981) (FDA).

Although state courts in interpreting their own APAs are not constrained by the case, a number have generally been receptive to its basic outlook. *See, e.g.*, *Grocery Mfrs. of Am., Inc. v. Department of Pub. Health*, 379 Mass. 70, 393 N.E.2d 881 (1979) (Massachusetts law did not contain a provision comparable to the APA's requirement of a statement of basis and purpose and the court was not willing to impose one); *Northern Plains Resource Council v. Board of Natural Resources & Conservation*, 181 Mont. 500, 594 P.2d 297 (1979); *Somer v. Woodhouse*, 28 Wash. App. 262, 275, 623 P.2d 1164, 1171 (1981) ("Where an agency is engaged in rule making in its purest form, additional procedural devices beyond those required by the administrative procedures act are not constitutionally required."). This phenomenon has not been limited to the general principles of *Vermont Yankee*. Some have given serious consideration to the compelling circumstances and constitutional constraint exceptions. *See, e.g.*, *Massachusetts Elec. Co. v. Department of Pub. Utils.*, 383 Mass. 675, 676 n.1, 421 N.E.2d 449, 450 n.1 (1981); *Tri-State Generation & Transmission Ass'n, Inc. v. Environmental Quality Council*, 590 P.2d 1324, 1331-32 (Wyo. 1979). Reference to and reliance upon the case have not been limited to administrative rulemaking. *See, e.g.*, *Atwell v. Power Auth.*, 67 A.D.2d 365, 380, 415 N.Y.S.2d 476, 484 (1979) (burden of proof in certificate of need proceeding) *appeal denied*, 49 N.Y.2d 797, 403 N.E.2d 456, 415 N.Y.S.2d 733 (1980); *Cannonsburg Gen. Hosp. v. Department of Health*, 492 Pa. 68, 75, 422 A.2d 141, 145 (1980) (certification of hospital building program). State cases rejecting *Vermont Yankee* are rare. *See, e.g.*, *Western Oil & Gas Ass'n v. Air Resources Bd.*, 181 Cal. Rptr. 199, 129 Cal. 3d 682 (1982); *see also Haight v. District of Columbia Alcoholic Beverage Control Bd.*, 439 A.2d 487, 491-92 (D.C. 1981) (the court was "hesitant to second guess" the liquor licensing board's evidentiary rulings if "within the bounds of reason"); *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 431 A.2d 560, 565 (D.C. 1981) (written summaries of expert testimony were adequate and in accord with the board's own rules of procedure); *Citizens Ass'n v. Zoning Comm'n*, 392 A.2d 1027, 1036-42 (D.C. 1978) (ex parte contacts not prohibited); *cf. Moskowitz, Vermont Yankee in California's Courts*, 13 PAC. L. J. 315 (1982).

56. The research method employed in this study would not reveal a quiet rebellion against the principles of *Vermont Yankee*. If a court were to ignore the decision, fail to cite it and proceed to impose additional rulemaking procedures, the case is likely to have fallen through the gap created by reliance on citation of *Vermont Yankee*. Presumably the adversarial process reduces this risk. It seems unlikely that a court would ignore a relevant and forceful argument based on *Vermont Yankee* without revealing that fact in its opinion.

by statute, notice and comment pursuant to section 553 of the APA sufficed, and the Federal District Court for the District of Columbia considered its role limited and narrow.<sup>57</sup> *Vermont Yankee* provides the barrier to courts doing more.<sup>58</sup>

The United States District Court for the Southern District of New York was similarly deferential in a case in which the underlying statute required more than simple notice and comment. In *Commodity Exchange, Inc. v. Commodity Futures Trading Commission*<sup>59</sup> the court found that more than submission of written comments was required in connection with the agency's disapproval of certain commodity exchange rules. The basis for this was the statutory "opportunity for hearing" that Congress required in rule disapproval proceedings; however, the court did not take this to mean that an adjudicatory hearing was in order.<sup>60</sup> It noted:

The APA mandates a trial-type hearing in rulemaking or adjudication only when the statute specifies that it be made "on the record." Section 5a(12) of the Act contains no such provision. Moreover, as the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* has clearly instructed, generally agencies should be free to fashion their own rules of procedures absent a congressional requirement that the hearing be "on the record" . . . .<sup>61</sup>

Nevertheless, on this occasion the court found that the agency had exceeded the bounds of its procedural freedom in limiting comment to written submissions. It held that an opportunity must be afforded for non-adjudicatory oral presentations on disapproval of the exchange rule; its reason was that this was what Congress intended.<sup>62</sup> But this was not a case of judicially created and imposed procedures in excess of notice and comment. It was one of assuring that the agency proceeded as Congress intended.

The influence of *Vermont Yankee* is particularly evident in cases in which Congress has been silent in the sense that the rules in question are exempt from APA notice-and-comment procedure. In *Saint Joseph Hospital v. Heckler*,<sup>63</sup> the United States District Court for the Northern District of Indiana upheld a rule concerning reimbursement for telephones used by Medicare patients. One assertion was that the agency had failed

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57. *Association of Am. R.R. v. Adams*, 485 F. Supp. 1077, 1083-84 (D.D.C. 1978) (challenge to adequacy of opportunity to be heard in Federal Railroad Administration's rulemaking concerning lighting devices on freight trains).

58. *National Treasury Employees Union v. Devine*, 577 F. Supp. 648, 651 (D.D.C. 1983) ("Absent an express timing provision concerning posting in the statute, the court declines to read one in.").

59. 543 F. Supp. 1340 (S.D.N.Y. 1982), *aff'd*, 703 F.2d 682 (2d Cir. 1983) (mem.).

60. *Id.* at 1347-48.

61. *Id.* at 1348.

62. *Id.* at 1352.

63. 570 F. Supp. 434 (N.D. Ind. 1983).

to create a contemporaneous record in promulgating the rule. The court rejected this argument "under the dictates of *Vermont Yankee*,"<sup>64</sup> noting that this rule was exempt from the APA's requirement of a "concise general statement of [the rule's] basis and purpose" that underlies the contemporaneous record requirement and that there was no common law of administrative procedure that it could invoke to create a record requirement.<sup>65</sup> *Bedford County General Hospital v. Heckler*<sup>66</sup> reached the same conclusion with respect to the same issue and the same rules.<sup>67</sup>

In rulemaking that is exempt from the notice and comment requirement, other district courts have held similarly in connection with other requests for added procedures. In *Haddon Township Board of Education v. New Jersey Department of Education*,<sup>68</sup> the United States District Court for the District of New Jersey concluded that a Department of Agriculture rule was interpretative and thus exempt; in light of *Vermont Yankee* it declined "to require any notice and comment procedures on the basis of common law notions of fundamental fairness which go beyond the APA mandate."<sup>69</sup> The United States District Court for the District of Massachusetts found that the APA's notice requirement was inapplicable to a Department of Interior change in its land acquisition policy, holding that such notice was "completely voluntary,"<sup>70</sup> and that the court was constrained by *Vermont Yankee* from imposing a notice requirement.<sup>71</sup> Yet another district court felt *Vermont Yankee* precluded

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64. *Id.* at 439; cf. *Diplomat Lakewood Inc. v. Califano*, 453 F. Supp. 442, 446-47 (D.D.C. 1978) (the court found the statement of basis and purpose in question sufficient under the APA, citing *Vermont Yankee*. This is an example of the case's influence where it need not have been invoked at all.), *rev'd*, 613 F.2d 1009 (D.C. Cir. 1979).

65. 570 F. Supp. 434, 437-39 (N.D. Ind. 1983).

66. 574 F. Supp. 943 (E.D. Tenn. 1983).

67. *Id.* at 946. The court stated:

Plaintiffs find a lack of consideration of relevant factors because the regulation was promulgated without a record. Rulemaking relative to benefits is exempt from Administrative Procedure Act rulemaking requirements . . . . Plaintiffs, however, argue that there is a constitutional or common law requirement for development of an administrative record. The United States Supreme Court has held that 5 U.S.C. § 553 'established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.' *Vermont Yankee* [citation omitted] . . . . Because the Secretary was exempt from rulemaking proceedings, the lack of an administrative record does not render the regulation in question arbitrary and capricious.

*Id.*

68. 476 F. Supp. 681, 698 n.15 (D.N.J. 1979).

69. *Id.* at 698 n.15; see also *Consolidated Aluminum Corp. v. TVA*, 462 F. Supp. 464, 475 (M.D. Tenn. 1978) (the court would not require notice-and-comment rulemaking for rules within the "public property" exception under the APA).

70. *Greenwald v. Olsen*, 583 F. Supp. 1002, 1006 n.11 (D. Mass. 1984).

71. *Id.* *Vermont Yankee* has assured comparable restraint in judicial review of procedures which attend preparation of environmental impact statements under the National Environmental Policy Act. *Gloucester County Concerned Citizens v. Goldschmidt*, 533 F. Supp. 1222, 1228 (D.N.J.), *aff'd*, 677 F.2d 259 (2d Cir. 1982);

prohibition of ex parte contacts in informal rulemaking, noting that "[w]hile such ex parte comments seem highly inappropriate, they do not appear to be prohibited under the Administrative Procedure Act . . . ." <sup>72</sup> The prevailing philosophy is that it is "not the role of the Court to impose a particular decision-making process on an agency where none has been provided by Congress." <sup>73</sup>

The district courts have not ignored the possible exceptions noted in *Vermont Yankee*, which would allow judicial imposition of additional procedures in rulemaking in cases of "constitutional constraints or in extremely compelling circumstances . . . ." <sup>74</sup> On one occasion, a district court rejected the argument that because an agency is entitled to require more procedural steps than even its own rules demand, the discretion to require more is not reviewable. Although it conceded that "*Vermont Yankee* lends support to this position" and requires judicial deference, that deference is not absolute. Before deciding that deference is appropriate, a court has the duty to determine whether either of the exceptions applies. <sup>75</sup>

Although they acknowledge the possibility of exceptions to the general *Vermont Yankee* rule, the district courts have yet to encounter a case justifying application of an exception. For example, one issue in *Consolidated Aluminum Corp. v. TVA* <sup>76</sup> was whether the court would be justified in imposing publication requirements on timetables for TVA Board meetings. It found that there were no established timetables and none had become established practice; therefore, the court could not justify intervention on the basis of *Vermont Yankee*'s exception for deviation from longstanding and well established practices. <sup>77</sup> In *Women's Health Services, Inc. v. Maher*, <sup>78</sup> the United States District Court for the District of Connecticut observed that although the plaintiff had not argued an absence of procedural due process, the argument would fail because the Constitution does not require a hearing in rulemaking, and the exception in *Vermont Yankee* is not available when, as in this case, the rule is of "broad applicability." <sup>79</sup>

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National Wildlife Fed'n v. Goldschmidt, 504 F. Supp. 314, 325 n.40 (D. Conn. 1980); Committee Against R.R. Relocation v. Adams, 471 F. Supp. 142, 145 (E.D. Ark. 1979).

72. McCulloch Gas Processing Corp. v. Department of Energy, 498 F. Supp. 194, 205 (D. Wyo. 1979), *aff'd in part, rev'd in part*, 650 F.2d 1216 (Temp. Emer. Ct. App. 1981).

73. Ashton v. Pierce, 541 F. Supp. 635, 644 (D.D.C. 1982), *aff'd*, 716 F.2d 56 (D.C. Cir. 1983).

74. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543 (1978). *See generally supra* text accompanying notes 21-22.

75. Utah Int'l, Inc. v. Department of Interior, 553 F. Supp. 872, 879-80 (C.D. Utah 1982).

76. 462 F. Supp. 464, 465 (M.D. Tenn. 1978).

77. *Id.* at 475.

78. 514 F. Supp. 265 (D. Conn. 1981).

79. *Id.* at 270-71 n.2.



*Saint Joseph's Hospital Health Center v. Blue Cross*<sup>80</sup> is another district court case that illustrates the probable outcome when the *Vermont Yankee* exceptions are invoked. It involved an unsuccessful challenge to Medicare rules authorizing disclosure of cost reports filed by participating hospitals. Although it was determined that the rules were promulgated in accordance with applicable APA procedures, the "plaintiff nonetheless urge[d] this Court to impose additional procedural requirements after the fact because the minimum requirements fixed by Congress did not ensure mature consideration of the interests at stake."<sup>81</sup> The court declined and adhered to the basic principle that agencies should be left to fashion their own rulemaking procedures. In the process it refused to consider this a case of extremely compelling circumstance, noting "the United States Supreme Court's repeated warning that the complexity or importance of the issues under consideration will not alone justify ex post facto judicial interference with agency rulemaking procedures."<sup>82</sup>

This does not mean, however, that the district courts' acceptance of *Vermont Yankee* has caused them to conclude that there is little for them to do in review of rulemaking. It does not mean that *Vermont Yankee* need only be cited and the courts will defer. In an action against the Corps of Engineers to prevent flooding of a Mississippi River floodway, the United States District Court for the Eastern District of Missouri described its scope of review as follows:

[I]n determining whether proper procedures have been followed by the agency, this Court is mindful that absent constitutional constraints or extremely compelling circumstances, administrative agencies should be free to fashion their rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their very important duties, subject to the statutory requirements of the Administrative Procedure Act.<sup>83</sup>

Yet the court still found that the agency's action was invalid rulemaking for failure to afford notice and comment.<sup>84</sup> What the court was performing was the obvious task of assuring that the statutory procedures Congress intended to require were afforded by the agency, a judicial role fully consistent with *Vermont Yankee* principles. Other district courts have taken a similar approach in concluding that notice-and-comment procedures were required<sup>85</sup> or that the statement of basis and purpose was

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80. 489 F. Supp. 1052 (N.D.N.Y. 1979).

81. *Id.* at 1061.

82. *Id.* at 1061-62; *accord* *Pacific Power & Light Co. v. Duncan*, 499 F. Supp. 672, 680 (D. Or. 1980) (challenge to rate increase of Bonneville Power Administration).

83. *Story v. Marsh*, 574 F. Supp. 505, 514 (E.D. Mo. 1983), *rev'd*, 732 F.2d 1375 (8th Cir. 1984).

84. *Id.* at 514-15.

85. *Associated Dry Goods Corp. v. Equal Employment Opportunity Comm'n*, 543 F.

inadequate.<sup>86</sup>

A striking aspect of the history of *Vermont Yankee* in the district courts is their inclination to apply its basic principles beyond the context of informal rulemaking. A statement that "it is significant that the *Vermont Yankee* case [is] concerned with agency rulemaking which, in this Court's view, is not comparable to the situation at hand"<sup>87</sup> is exceptional. The norm has been to invoke, apply, and expand *Vermont Yankee* to other forms of administrative action.

*Becker v. Blum*<sup>88</sup> represents an intermediate point in this transition of the *Vermont Yankee* rule from application to rulemaking to application to other forms of administrative action. In *Becker*, Medicaid beneficiaries had challenged the notice required under the New York Social Services Law and the regulations by which that law was implemented. In defense, the state agency challenged the validity of federal regulations that governed state notice to recipients; it argued that the rules were arbitrary and capricious in requiring notice.<sup>89</sup> The procedures by which the rules were promulgated were not at issue. The argument concerned the desirability of notice in adjudicatory proceedings, and the United States District Court for the Southern District of New York found: "The federal regulations are not arbitrary but reasonably serve a valid purpose. 'Absent constitutional constraints or extremely compelling circumstances' [citation to *Vermont Yankee*] . . . , the federal regulations must be and are upheld."<sup>90</sup> Thus, this court used *Vermont Yankee* to define a test for substantive review of rules, and not just for review of the procedures by which those rules had been promulgated.<sup>91</sup>

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Supp. 950, 964 (E.D. Va. 1982) ("[t]he Court is convinced that the substantial impact test survives the Supreme Court's prohibition of the judicial formulation of hybrid rulemaking proceedings in *Vermont Yankee* . . . ."); *Cerro Metal Prod. v. Marshall*, 467 F. Supp. 869, 879-80 (E.D. Pa. 1979) ("But the determination of whether a regulation substantially affects the rights of those it regulates does not stray beyond the Act, rather it serves to define what is a procedural rule within the meaning of the Act."); *Sannon v. United States*, 460 F. Supp. 458, 466 (S.D. Fla. 1978), *rev'd on other grounds*, 631 F.2d 1247 (5th Cir. 1980).

86. See *McCulloch Gas Processing Corp. v. Department of Energy*, 498 F. Supp. 194, 200-04 (D. Wyo. 1979), *aff'd in part, rev'd in part*, 650 F.2d 1216 (Temp. Emer. Ct. App. 1981).

87. *Georgia Gazette Publishing Co. v. United States Dep't of Defense*, 562 F. Supp. 1004, 1007 (S.D. Ga. 1983) (preliminary injunction granted following award of publishing contract for military post newspaper).

88. 464 F. Supp. 152 (S.D.N.Y. 1978).

89. *Id.* at 157.

90. *Id.*

91. See *Fort Worth & D. Ry. v. Goldschmidt*, 518 F. Supp. 121, 138 (N.D. Tex. 1981) ("Therefore, from the very language of the statute, it is clear that Congress intended that the FRA be allowed wide discretion in establishing the actual penalty level. This Court is therefore, extremely reluctant to substitute its judgment for that of the agency. *Vermont Yankee* . . . ."), *rev'd*, 693 F.2d 432 (5th Cir. 1982); *Holbrook v. Pitt*, 479 F. Supp. 990, 996 (E.D. Wis. 1979), *rev'd*, 643 F.2d 1261 (7th Cir. 1981) (rule allowing apparently arbitrary retroactive certification for eligibility for HUD benefits not challenged; court cited *Vermont Yankee* for the proposition that it was

*Pasco Terminals, Inc. v. United States*<sup>92</sup> involved an action against the Tariff Commission to recover dumping duties. The Customs Court turned aside assertions that cross-examination was required in the administrative proceeding, noting that the applicable statute did not require a hearing, and that due process did not necessarily require a trial-type hearing with an opportunity for cross-examination. The administrative action in this instance was only an informal adjudicatory type fact finding investigation for which neither statute nor Constitution demanded cross-examination.<sup>93</sup> There is little that is extraordinary in the court's conclusion, but it is noteworthy that the court quoted the "absent constitutional constraints or extremely compelling circumstances . . ." language of *Vermont Yankee* as authority.<sup>94</sup> This district court thus went beyond applying the *Vermont Yankee* doctrine to procedural review of informal or hybrid rulemaking, beyond application to substantive review of rules, and in fact extended application of the *Vermont Yankee* principles entirely beyond the context of rules and rulemaking to a new area: to procedural review of informal adjudicatory proceedings.

Other cases invoking *Vermont Yankee* to justify a limited judicial role in review of agency adjudicatory procedures include an action by a federal employee to recover health insurance benefits,<sup>95</sup> and an action against EPA to review its decision to stop further processing of a grant application for a sewerage treatment plant.<sup>96</sup>

*Vermont Yankee* has also influenced district courts' perceptions of their own equitable powers. For example, in an action to remove a federally appointed receiver for a state savings and loan, a district court found the Federal Home Loan Bank Board's action in appointing the receiver to be in violation of the applicable statute and its underlying policy. The court therefore ordered the receiver removed.<sup>97</sup> It held that the Board had failed to establish the statutory prerequisites for Board jurisdiction, but noted that the "power to reexamine the Board's decision [that it had

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"not at liberty to impose [its] own notions as to how the . . . program ought to be administered").

92. 477 F. Supp. 201 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980).

93. *Id.* at 213.

94. *Id.*

95. *Levin v. Connecticut Blue Cross, Inc.*, 487 F. Supp. 385, 386-88 (N.D. Ill. 1980) (court notes that since Congress gave the Office of Personnel Management discretion as to performance of its duties, the agency's procedures are "immune from attack absent either constitutional constraints or extremely compelling circumstances").

96. *State ex rel. Burch v. Costle*, 452 F. Supp. 1154, 1157 (D.D.C. 1978) (when an agency exercises judgment on a set of facts, the court should defer and not substitute its judgment for that of the agency); *cf. Southwest Jefferson County Homeowners, Inc. v. Costle*, 468 F. Supp. 405, 407-09 (W.D. Ky. 1979) (court refused to intervene in EPA's decision not to require an environmental impact statement as to part of a sewer project, "absent a showing of extremely compelling circumstances or any constitutional constraint . . .").

97. *Fidelity Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 540 F. Supp. 1374 (N.D. Cal.), *rev'd*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

jurisdiction to appoint a receiver] is not unlimited. On the contrary, the normal rule that fundamental policy questions should be resolved by the legislative and executive branches and not by the courts applies with equal force to the present situation."<sup>98</sup> The court cited *Vermont Yankee* for this proposition, thus acknowledging that application of the *Vermont Yankee* doctrine can limit a court's equity jurisdiction.<sup>99</sup>

When there is no question of jurisdiction, however, one district court has found nothing in *Vermont Yankee* to inhibit the exercise of its power to formulate equitable relief commensurate to the harm. Citing *Vermont Yankee*, among others, it noted that "although the Supreme Court has made it clear that a court, in formulating equitable relief, should not usurp traditional administrative functions," once jurisdiction is established the court may provide such equitable relief as necessary to address the harm.<sup>100</sup> Finally, in a case in which a disappointed bidder sought an injunction prohibiting award of a publishing contract for an army post's newspaper, a district court dismissed arguments against the injunction based on *Vermont Yankee*. The court reasoned that neither statute nor regulation required use of informal rulemaking procedures in making the contract award, that *Vermont Yankee* concerned agency rulemaking, and that therefore the situation in *Vermont Yankee* was one which "is not comparable to the situation at hand."<sup>101</sup> The significance of these cases is not so much that district courts may perceive *Vermont Yankee* to mandate limited use of their equity powers when administrative agencies are involved, but is rather that one finds the courts confronting *Vermont Yankee* so far afield from judicial imposition of additional procedures in informal rulemaking.<sup>102</sup>

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98. *Id.* at 1378; see also *Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 572 F. Supp. 997, 1003-04 (S.D. Fla. 1983) (Board's exercise of discretion in deciding whether to exercise jurisdiction to appoint a receiver not entirely beyond reach of court's review, because Board accused of "outrageous behavior"; court nevertheless acknowledged that a court is generally to refrain from substituting its judgment for the Board's decision to exercise jurisdiction, once the court is satisfied that statutory criteria were met).

99. *Fidelity Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 540 F. Supp. 1374, 1378, *rev'd*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

100. *Doe v. Heckler*, 580 F. Supp. 1224, 1228 (D. Md. 1984).

101. *Georgia Gazette Publishing Co. v. United States Dep't of Defense*, 562 F. Supp. 1004 (S.D. Ga. 1983).

102. *Vermont Yankee* has also been considered in a number of class actions challenging administrative delay in Social Security benefit hearings. See, e.g., *Deloney v. Califano*, 488 F. Supp. 610, 613 (N.D. Ill. 1980) ("The Court also has reservations with respect to the proper role of the courts in this type of administrative proceedings. In *Vermont Yankee* . . . the Supreme Court expressed concern that reviewing courts will '(engraft) their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.' . . . While evidence of greatly disproportionate delays in agency action or evidence of a lack of evenhandedness or a dilatory motive on the part of an agency may in some cases warrant judicial relief, here there is no such evidence."); *Blankenship v. Secretary*, 522 F. Supp. 618, 619-20 (W.D. Ky. 1981) ("We agree with the defendants that examination of the proposals for 'desirability' would, under the circumstances of this case, violate all prin-

*Vermont Yankee* has had an even more curious history in the district courts in its relationship to some traditional administrative law doctrines. In one case, the plaintiff sought an injunction against the Consumer Product Safety Commission (CPSC) to bar release of information concerning its products. The CPSC was in the process of promulgating disclosure rules, and the District Court for the Northern District of New York found that the information could not be disclosed until the rulemaking process was complete. It said that it would not pass on the rules until they were adopted and cited *Vermont Yankee* for the proposition that judicial review on the CPSC's substantive defenses was precluded for now.<sup>103</sup> The court thus brought *Vermont Yankee* into the area of the doctrine of exhaustion of administrative remedies. In another case a district court observed that "the method of exercising the delegated authority, whether by rulemaking or adjudication, is up to the Secretary to determine," and cited only *Vermont Yankee*.<sup>104</sup> *SEC v. Chenery Corp.*<sup>105</sup> (*Chenery II*) is the case usually cited to support this proposition. Is *Vermont Yankee* now to supplant *Chenery II*?

The reality is that the district courts have not only followed *Vermont Yankee*, but arguably have extended it. Cases resisting, much less rejecting, its principles are few. Only one appears to depart from it. In *Hoeber v. District of Columbia Redevelopment Land Agency*,<sup>106</sup> the District Court for the District of Columbia held that an area urban renewal plan could not be modified without an impact analysis and written consent of affected landowners and lessees. The court noted that the agency could adopt rules to establish a method for determining substantial and adverse effects on such persons and observed:

*Vermont Yankee* . . . is not inconsistent with this procedure. In that case, the Supreme Court held that courts may not impose procedural requirements beyond those specified in the Administrative Procedure Act . . . . Here, plaintiffs have not requested the imposition of additional procedural requirements, but the Court is filling a void left by a statutory provision which necessitates procedures to give it meaning and content.<sup>107</sup>

*Vermont Yankee*, of course, suggests that just this kind of procedural void is to be filled by Congress or the agency and *not* by the judiciary.

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ciples of separation of powers. *Vermont Yankee* . . . . We do not believe that . . . this Court [has] the authority to reach out to decide issues of purely internal administration.").

103. *Fountainhead Group, Inc. v. CPSC*, 527 F. Supp. 294 (N.D.N.Y. 1981), *order vacated*, 559 F. Supp. 17 (N.D.N.Y. 1982).

104. *Matze v. Block*, 564 F. Supp. 1157, 1166 (D. Kan. 1983), *aff'd in part, rev'd in part*, 732 F.2d 799, 802-03 (10th Cir. 1984) (the court of appeals was willing to require rulemaking rather than adjudication on abuse of discretion grounds).

105. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (the choice between rulemaking and adjudication is primarily a matter for the "informed discretion" of the agency).

106. 483 F. Supp. 1356 (D.D.C. 1980), *aff'd*, 672 F.2d 894 (D.C. Cir. 1981).

107. *Id.* at 1369 n.45.

*B. Courts of Appeals Other Than the Court of Appeals for the District of Columbia Circuit*

The pattern in the courts of appeals has been comparable to that in the district courts, with only slightly greater evidence of an inclination to limit or to depart from the teaching of *Vermont Yankee*. In light of the importance of the Court of Appeals for the District of Columbia Circuit in administrative law generally, and especially in *Vermont Yankee*, it is examined separately in the section that follows. Courts of appeals have cited *Vermont Yankee* in a number of cases in which the courts declined to impose additional procedural requirements in rulemaking.<sup>108</sup>

*McCulloch Gas Processing Corp. v. Department of Energy*<sup>109</sup> presented an interesting and added dimension to the *Vermont Yankee* prob-

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108. See, e.g., *American Mining Congress v. Marshall*, 671 F.2d 1251, 1260-61 (10th Cir. 1982) (alleged procedural defects in an informal rulemaking were agency's failure to stamp documents with date and failure to include in index certain documents received after close of comment period; court refused to declare rule invalid, finding no evidence that agency had relied on late documents or that documents were critical, and that "for this court to impose these requirements would be to disregard the Supreme Court's holding" in *Vermont Yankee*); *North Am. Van Lines v. ICC*, 666 F.2d 1087, 1092 (7th Cir. 1981) (ICC allegedly failed to give sufficient time for study of proposed rule; actually ICC had extended the statutory period for comment from 30 to 45 days; court found the demand for more without merit and beyond its authority). In another case involving time limits and the ICC, an agency rule provided that determinations of market dominance for ratemaking purposes could be made within 90 days. *Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1982), *aff'd en banc*, 719 F.2d 772 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2160 (1984). The court cited *Vermont Yankee* and found that the agency is the "best arbiter of its ability adequately to consider those factors within the time allowed." *Id.* at 392. For other cases in which courts of appeals found *Vermont Yankee* to require judicial restraint from imposition of additional procedural requirements in rulemaking, see *Katherine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 670 (2d Cir. 1979) (court refused to impose limits on ex parte contacts between agency and an "allegedly biased staff in rulemaking," citing *Vermont Yankee* and noting that the alleged contacts did not violate due process and are more appropriately dealt with by Congress; rule ultimately held invalid on grounds of violation of the applicable statute), *reh'g denied*, 628 F.2d 755 (2d Cir. 1980). The dissenting judge on the denial of rehearing noted: "I can only hope that the Court which decided *Vermont Yankee* . . . will examine this, in my opinion, unjustifiable intrusion into the administrative process." *Id.* at 758. The dissenter believed that the majority, in setting aside the FTC's rule on vocational and home study schools, had gone too far in its interpretation of the degree of specificity which the statute required in the rule. *Accord* *Belenke v. SEC*, 606 F.2d 193, 198 (7th Cir. 1979) (the argument that the SEC should have followed a "more exacting procedural formula" in approving amendments to exchange rules "violates the Supreme Court's admonition in *Vermont Yankee* that reviewing courts should be hesitant to impose more procedural requirements than found in the authorizing statute or adopted by the administrative agency"); *Barton v. Bergland*, 579 F.2d 1009, 1011 (6th Cir. 1978) (summary judgment affirmed denying injunction to suspend a Department of Agriculture rule; court noted that the effect of the requested action would be to amend or suspend the rule without normal rulemaking procedures, and it could not do this without imposing its own notions of "correct procedures" in contravention of *Vermont Yankee*).
109. 650 F.2d 1216 (Temp. Emer. Ct. App. 1981), *aff'g in part, rev'g in part*, 498 F. Supp. 194 (D. Wyo. 1979). See *supra* text accompanying notes 72 & 86 for a discussion of other aspects of the district court's decision.

lem. To determine whether the administrative record was complete, the district court had permitted depositions of agency officials responsible for the rulemaking. The depositions, however, went beyond this purpose, and the district court relied on some of the additional information garnered to invalidate the rule.<sup>110</sup> The court of appeals found that:

the district court exceeded its authority in its consideration of the depositions. In *Vermont Yankee* . . . the Court noted the broad discretion vested in an agency to decide how it may best proceed to develop the needed evidence to support its decision . . . , and warned that unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding seriously interferes with the process prescribed by Congress.<sup>111</sup>

The effect of the decision was to treat the district court's use of the depositions as an impermissible addition of procedure to the rulemaking process.

Challenges to agency rulemaking procedures have been similarly unsuccessful in cases involving rules exempt from APA procedures.<sup>112</sup> The prevailing view of *Vermont Yankee* is that its principles apply whether or not a rule is exempt from notice and comment under the APA.<sup>113</sup> The issue is typically presented in a case in which a rule is considered interpretative and thus exempt, but the court nevertheless is asked to require notice and comment.<sup>114</sup> The general theory supporting imposition of no-

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110. *McCulloch Gas Processing Corp.*, 650 F.2d at 1229.

111. *Id.*

112. *E.g.*, *American Transfer & Storage Co. v. ICC*, 719 F.2d 1283, 1303-06 (5th Cir. 1983) ("This case presents just the sort of 'subordinate questions of procedure' . . . which ought to be left to the informed discretion of the Commissioner"; thus, the court did not exercise the independent judgment it might have in addressing allegations of procedural irregularity, including material change between proposed and final rule). Furthermore, the courts will and should make an independent determination of whether the rule is exempt or not. If it is not exempt, requiring notice-and-comment procedures to satisfy the terms of the APA is entirely consistent with *Vermont Yankee*. *E.g.*, *Mobil Oil Corp. v. Department of Energy*, 610 F.2d 796, 804-05 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980); *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1061-62 (Temp. Emer. Ct. App. 1978) (court noted that in determining that the rule was interpretative it was not imposing additional procedures; its concern was "compliance with minimum statutory requirements").

113. *Love v. United States Dep't of Hous. & Urban Dev.*, 704 F.2d 100, 105 n.17 (3d Cir. 1983).

114. The issue also has been presented in cases involving the question of whether rulemaking was exempt from notice and comment under the "good cause" exception in section 553(b) of the APA. Thus, the Temporary Emergency Court of Appeals has refused to "impose a new procedural requirement . . . contrary to *Vermont Yankee*" when it was satisfied that the notice of "good cause" did provide an adequate explanation. *Mobil Oil Corp. v. Department of Energy*, 728 F.2d 1477, 1493 n.21 (Temp. Emer. Ct. App. 1983), *cert. denied*, 104 S. Ct. 3545 (1984). On the other hand, the court indicated it was not imposing additional procedures contrary to *Vermont Yankee* when it concluded in another case that the "good cause" exception was not available and therefore that notice and comment were required.

tice and comment in such cases is that a common law of fairness demands this result when the interpretative rule has a "substantial impact" on a segment of the public.<sup>115</sup>

The general reaction in the courts of appeals has been that this position is untenable in light of *Vermont Yankee*<sup>116</sup> because the decision "cast considerable doubt on the viability of those cases holding that the notice and comment procedure may be judicially required even when not required by the terms of the APA."<sup>117</sup> A number have been fully cognizant of Professor Kenneth Culp Davis's view that *Vermont Yankee* should be interpreted narrowly and does not preclude judicial development of administrative common law in such cases.<sup>118</sup> This is noteworthy in light of the frequency with which the federal courts follow his lead.

The courts of appeals also have recognized the possible exceptions to *Vermont Yankee*. Most of the cases in which the exceptions have been raised, however, have involved proceedings other than informal rulemaking. *Love v. United States Department of Housing & Urban Development*<sup>119</sup> illustrates the exceptions in the context of rulemaking. The district court had ordered notice-and-comment rulemaking to implement tenant comment procedures for identifying unreasonable lease provisions. The district court's order was quite specific concerning how HUD was to handle tenant comments.<sup>120</sup> HUD argued that under *Vermont Yankee* the district court's order constituted "an unwarranted intrusion on the Agency's prerogative" and was not a legitimate exercise of the court's equitable powers or required under due process.<sup>121</sup>

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Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 804 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980). In another case the EPA argued that statutory deadlines in developing federal air quality standards justified a "blanket exemption" from notice and comment under the "good cause" standard; it pointed to *Vermont Yankee* in support of this position. The court concluded that "[s]uch an interpretation of 'good cause' would amount to judicial legislation." *Western Oil & Gas Ass'n v. United States Env'tl. Protection Agency*, 633 F.2d 803, 810-12 (9th Cir. 1980).

115. *Louisiana-Pacific Corp. v. Block*, 694 F.2d 1205, 1210 (9th Cir. 1982).

116. *See Rivera v. Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983), *cert. denied sub nom.*, *International Union v. Donovan*, 104 S. Ct. 1591 (1984); *American Trucking Ass'ns, Inc. v. United States*, 688 F.2d 1337, 1351-52 (11th Cir. 1982) (dictum), *cert. denied*, 104 S. Ct. 3509 (1984); *Louisiana-Pacific Corp. v. Block*, 694 F.2d 1205, 1209-10 (9th Cir. 1982) (dictum); *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 986-88 (9th Cir. 1980); *Energy Consumers and Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129, 139-41 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978).

117. *Rivera v. Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983), *cert. denied sub nom.*, *International Union v. Donovan*, 104 S. Ct. 1591 (1984).

118. *Id.*; *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 987 (9th Cir. 1980); *cf. Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1096 (Temp. Emer. Ct. App. 1978) (judicial development of administrative common law is feasible only in rare instances).

119. 704 F.2d 100 (3d Cir. 1983).

120. *Id.* at 103.

121. *Id.* The court of appeals did not reach the issue of mandatory rulemaking presented



The Court of Appeals for the Third Circuit observed that informal rulemaking was the appropriate mechanism for identifying unreasonable lease provisions and that judicial imposition of other means of doing so carried with it the risk of exactly what *Vermont Yankee* feared — “a hovering judicial spectre [that] would scare agencies into adopting full adjudicatory procedures . . . .”<sup>122</sup> It rejected the argument that the constitutional constraint exception justified more, reasoning that the Constitution “does not require the resolution of facts on a case-by-case basis” to determine unreasonable lease provisions, and that there was no showing of compelling circumstances.<sup>123</sup>

Both the Fourth and Seventh Circuits have also considered application of the *Vermont Yankee* exceptions in the rulemaking context. The Court of Appeals for the Fourth Circuit had little difficulty in disposing of a claim, based upon due process, for additional procedures in rulemaking: “The allegation that there is a constitutional right to notice and an opportunity to comment when an agency makes rules of general applicability is frivolous. It presents no substantial constitutional claim.”<sup>124</sup> Likewise, in a rulemaking case involving a request for more time to comment than required by the applicable statute, the Court of Appeals for the Seventh Circuit found no compelling circumstances justifying departure from the rule of *Vermont Yankee*.<sup>125</sup>

Yet, as noted, the more extensive discussion of the exceptions is found in cases in which informal rulemaking procedure was not at issue. For example, in *Seacoast Anti-Pollution League v. Costle*,<sup>126</sup> the First Circuit reviewed the adjudicatory procedures employed by the EPA<sup>127</sup> in approving a nuclear plant’s cooling system. The EPA Administrator had ordered his staff not to appear as proponents of any particular result and to avoid adversarial positions, and the petitioners argued that this “novel order” was improper.<sup>128</sup> The court noted that agencies have “wide latitude in fashioning their procedural rules.”<sup>129</sup> It also observed that although *Vermont Yankee* recognizes a possible exception for unjustified departures from well settled and longstanding agency practice, and even assuming the “novel order” was such an unjustified departure, that exception is limited “to where the agency deprived some party other than

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by the case. By the time the case reached the court, HUD had completed its rulemaking and did not appeal the issue. *Id.* at 102-03.

122. *Id.* at 103.

123. *Id.* at 105.

124. *Starnes v. Schweiker*, 715 F.2d 134, 141 n.4 (4th Cir. 1983), *cert. granted*, *Heckler v. Starnes*, 104 S. Ct. 2673 (1984).

125. *North Am. Van Lines v. ICC*, 666 F.2d 1087, 1092 (7th Cir. 1981).

126. 597 F.2d 306 (1st Cir. 1979).

127. The EPA’s order affirmed a prior order that had been invalidated by the Court of Appeals for the First Circuit, which had remanded the issue to the EPA for rehearing. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978).

128. *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 307-08 (1st Cir. 1979).

129. *Id.* at 308.

itself of important procedural rights normally accorded."<sup>130</sup> This case was not of that nature.<sup>131</sup>

In *Sierra Club v. United States Army Corps of Engineers*,<sup>132</sup> the Second Circuit overruled a district court<sup>133</sup> that had appointed a special master to oversee agency compliance with the district court's order setting forth certain procedural requirements for preparing Environmental Impact Statements.<sup>134</sup> The court of appeals vacated that portion of the judgment relating to the special master; in doing so it relied extensively on *Vermont Yankee* and stated that "except in most extraordinary circumstances, the courts may not control the internal operations of federal administrative agencies . . . ."<sup>135</sup> It was not willing to conclude that the case involved "extremely compelling circumstances"; assurance of timely compliance and reducing the risk of later litigation were not enough to justify appointment of the special master.<sup>136</sup>

Application of the *Vermont Yankee* exceptions has also been raised and rejected in a case involving a state's request that the Nuclear Regulatory Commission institute a proceeding and hold a hearing concerning nuclear licensing,<sup>137</sup> the Interstate Commerce Commission's denial of a petition to reopen a railroad abandonment proceeding,<sup>138</sup> and enforcement of a National Labor Relations Board bargaining order which was developed through investigation rather than full adversarial procedures.<sup>139</sup>

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130. *Id.* at 308 n.1.

131. See also *Season-All Industries, Inc. v. NLRB*, 654 F.2d 932 (3d Cir. 1981). In this case the court ordered an evidentiary hearing to investigate irregularities in connection with a representation election. The dissent believed the majority had required a hearing when the "factual predicate" for a hearing was lacking, that the result was "a court crafted rule" requiring a hearing on the basis of vague and unsupported allegations, and that this contravened the principle of *Vermont Yankee* that procedural matters are to be left to the agency. *Id.* at 942-43 (Adams, J., dissenting). The majority responded that its direction of an evidentiary hearing did not "in any way implicate *Vermont Yankee* . . ." because all it was doing was requiring the agency to follow its own policy to hold hearings when there is a dispute as to substantial and material issues of fact. *Id.* at 940-41 n.5.

Perhaps neither intending to nor aware that it had done so, the court apparently applied the "unjustified departure" exception to the *Vermont Yankee* rule — but in the context of an adjudication rather than a rulemaking.

132. 701 F.2d 1011 (2d Cir. 1983).

133. 541 F. Supp. 1367 (S.D.N.Y. 1982).

134. 701 F.2d 1011, 1042-43, 1043 n.30 (2d Cir. 1983).

135. *Id.* at 1042. The Court considered the action of the court of appeals in *Vermont Yankee* "far less intrusive than . . . here, where the special master apparently was to control every detail of every step of the agencies' reconsiderations." *Id.* at 1043.

136. *Id.* at 1043. The court also found there was insufficient evidence to present "a clear and convincing picture of such pervasive bad faith as to suggest that absent judicial supervision, the agency probably will not obey an injunction detailing its obligations." *Id.* at 1048.

137. *People v. Nuclear Regulatory Comm'n*, 591 F.2d 12, 15-16 (9th Cir. 1979).

138. *City of Wausau v. United States*, 703 F.2d 1042, 1044-45 (7th Cir. 1983).

139. *NLRB v. ARA Sers., Inc.*, 717 F.2d 57, 69 (3d Cir. 1983) (Adams, J., concurring). The dissent suggested that to require a hearing in this case was to require no more

There is at least one court of appeals case that does appear to have relied on the exceptions to impose additional procedures outside of the informal rulemaking context. The Interstate Commerce Commission had approved an application for a certificate of public convenience and necessity to abandon a railroad line.<sup>140</sup> The Commission had denied an opportunity for cross-examination on supplementary evidence received by the agency. Upon review, the Court of Appeals for the Seventh Circuit viewed the case as an informal adjudication<sup>141</sup> and concluded that cross-examination should have been allowed. It noted:

We begin with a reluctance to interfere with an agency's freedom to fashion its own rules of procedure. See *Vermont Yankee* . . . . But although requests for cross-examination are addressed to the discretion of an agency, that discretion is not unlimited. A court may determine that 'extremely compelling circumstances,' *Vermont Yankee* . . . exist to indicate that an agency's decision constitutes an abuse of discretion. The question before us, then, is whether the facts here rise to such extremely compelling circumstances that the ICC should have afforded the parties the opportunity for cross-examination.<sup>142</sup>

It explained:

We emphasize the narrowness of our conclusion . . . . We do not hold that the ICC must afford cross-examination in all cases where supplemental evidence is taken after proceedings in which cross-examination was allowed. Rather, our conclusion is based on the combination of factors in this case: cross-examination was initially allowed; it played a key role in the determination of facts in the initial hearing; the agency then received supplemental evidence of the same type as that provided, and discredited after cross-examination, in the initial hearing; and the agency's final decision ignored the many serious factual disputes and gave no indication that the agency could have resolved those disputes on the basis of the written supplementary evidence submitted.<sup>143</sup>

The intriguing feature of the case is that it was unnecessary for the court to turn to *Vermont Yankee*. It had recognized the adjudicatory nature of the proceeding and noted that "while there is no across-the-board right to oral argument in every administrative proceeding, . . . the general principle is that the right to be heard in adjudicative proceedings encompasses due process rights in excess of the right to submit written evi-

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than the Board's own rules, and consequently there was no conflict with *Vermont Yankee*. *Id.* at 74 n.8 (Garth, J., dissenting).

140. *People v. United States*, 666 F.2d 1066 (7th Cir. 1981).

141. *Id.* at 1071-72.

142. *Id.* at 1082.

143. *Id.* at 1083.

dence."<sup>144</sup> Traditional notions of due process in administrative adjudication would therefore have sufficed to require cross-examination.<sup>145</sup>

The general principles of *Vermont Yankee* have had their impact in the courts of appeals in contexts other than the procedures applicable in informal rulemaking.<sup>146</sup> The general position is that when Congress es-

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144. *Id.* at 1082.

145. *Cf. Chicago, M., St. P. & Pac. R.R. v. United States*, 585 F.2d 254 (7th Cir. 1978). In this case, a railroad petitioned for review of an Interstate Commerce Commission dismissal of its application to be included in a railroad merger. The court concluded that dismissal of the application was arbitrary, capricious, and an abuse of discretion by reason of inadequate notice of oral arguments on the merits of the railroad's application. *Id.* at 259-60. The ICC argued that the APA's notice requirements were inapplicable because this proceeding was neither rulemaking nor formal adjudication, and the court agreed. *Id.* at 260. The court said, however, that analysis could not end at that: "Fundamental fairness in administrative proceedings requires notice clearly informing a party of the proposed action and basis for that action." *Id.* The court considered notice particularly important and its absence here "particularly unfair" in light of the "substantial economic detriment" possible. *Id.* at 262. The court also agreed that there was no statutory duty to hold a hearing or make findings, but that nevertheless "some type of fair proceeding" was in order. *Id.* at 262-63.

As to the nature of that "fair proceeding," the court made clear that the agency could not employ summary procedures without an opportunity to be heard on the merits. *Id.* The court further noted that courts may impose additional procedures for reasons of fairness to ensure "principled decision-making," but that the exact formulation of those procedures must be left to the agency, as *Vermont Yankee* requires. *Id.* at 263 n.15.

Thus we do not prescribe the exact nature of the notice requirement nor do we prescribe the procedure by which the ICC should provide the Milwaukee with an opportunity to be heard. We do leave these procedural matters to the discretion of the ICC, but nevertheless require that there be an appropriate exercise of that discretion.

*Id.*

The court thus required more procedural opportunities than any applicable statute demanded or the agency desired, but without great specificity as to just what was required.

146. *See, e.g., Banks v. Federal Aviation Admin.*, 687 F.2d 92, 94-97 (5th Cir. 1982) (court reluctant to require new hearing rather than reinstatement when the evidence upon which an employee discharge was based violated due process); *New Orleans Pub. Serv., Inc. v. Federal Energy Regulatory Comm'n*, 659 F.2d 509, 515 (5th Cir. 1981) (court denied request for a "second duplicative evidentiary hearing" in a Federal Energy Regulatory Commission approval of contested natural gas rate-filing settlements); *Zachary v. Federal Energy Regulatory Comm'n*, 621 F.2d 155, 158-59 (5th Cir.), *cert. denied*, 449 U.S. 1066 (1980) (court denied requests that the judiciary impose an evidentiary hearing or oral argument in a Federal Energy Regulatory Commission proceeding when there were no disputed facts); *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n*, 598 F.2d 759, 773 (3d Cir. 1979) (court denied request that the judiciary impose an adjudicatory hearing on a Nuclear Regulatory Commission declaration of a moratorium on licensing decisions and rulemaking concerning recycling of spent fuels); *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1234 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (court reluctant to require extensions when statutory EPA deadlines for water pollution permits had not been met); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 582 F.2d 166, 167-75 (2d Cir. 1978) (court would not interfere in agency denial of petition for rulemaking on permanent disposal of spent

establishes procedures for administrative action, whether by informal rulemaking, formal rulemaking, or by adjudication, and the agency does not elect to afford more, "the courts may not override the determination simply because they believe other procedures would be preferable."<sup>147</sup> *Kenworth Trucks of Philadelphia, Inc. v. NLRB*<sup>148</sup> illustrates a typical application of the *Vermont Yankee* doctrine in the context of adjudication. The case was a rehearing to reconsider the court's pre-*Vermont Yankee* decision in which it had found that the NLRB must provide an independent statement of basis for its bargaining order, and not simply

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wastes when agency preferred to address the issue in individual licensing proceedings); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1270 (5th Cir. 1978) (court reluctant to impose procedural requirements in government procurement). In each of these cases *Vermont Yankee* was cited in justifying reluctance to interfere with the agencies' inclinations.

The courts of appeals also have considered the matter of administrative delay in social security benefit proceedings. Some of them have invoked *Vermont Yankee* in refusing to impose mandatory time limits on the adjudication of these claims. In *Wright v. Califano*, 587 F.2d 345, 351-56 (7th Cir. 1978), the court found that the delays were not so unreasonable as to justify judicial intervention when, as in this case, due process was not denied. The court noted that the Supreme Court in *Vermont Yankee* had cautioned against courts "engrafting" their own notions of proper procedure. *Id.* at 352. The court in *Day v. Schweiker*, 685 F.2d 18, 22 (2d Cir. 1982), *vacated on other grounds*, *Heckler v. Day*, 104 S. Ct. 2249 (1984), was similarly inclined. It felt Congress had the ultimate responsibility for correcting problems in the administration of federal programs, although it also believed there was a role for the court when the applicable statute was not being followed. *Id.* at 22. See *supra* note 102 for a discussion of the district court cases.

147. *Caulfield v. Board of Educ.*, 583 F.2d 605, 614-15 (2d Cir. 1978) (the applicable statutes required a hearing only when the agency sought termination of funds, and the court would not require a hearing and public participation before the agency could enter a memorandum of understanding allowing the school board to assign teachers on the basis of race).

The Interstate Commerce Commission in particular has been the object of claims for judicially imposed procedures, which the courts of appeals generally have rejected. See, e.g., *People v. ICC*, 698 F.2d 868, 872 (7th Cir. 1983) (court turned aside requests for more intrusive administrative appellate review in a railroad abandonment proceeding); *Simmons v. United States*, 698 F.2d 888, 893 (7th Cir. 1983) (court refused to intervene in the agency's decisions refusing an extension of time to respond to new evidence, a postponement of the hearing because counsel had a court conflict, and requiring that the administrative law judge hear "oral opposition testimony upon remand"; court considered its role "narrow" in reviewing procedural issues, citing *Vermont Yankee*); *People v. ICC*, 687 F.2d 1047, 1057 (7th Cir. 1982) (court turned aside request for a public hearing on a decision to allow one railroad to acquire another); *Laird v. ICC*, 691 F.2d 147, 154-55 (3d Cir. 1982) (court turned aside request for an oral hearing and discovery on a petition to set aside commission approval of a regulated carrier's reverse stock split), *cert. denied*, 103 S. Ct. 2086 (1983); *American Trucking Ass'n v. ICC*, 659 F.2d 452, 460-61 (5th Cir. 1981) (review of ICC rules for informal adjudication in which the court refused to impose more than the notice and comment afforded), *cert. denied*, 103 S. Ct. 1272 (1983); *Akron, C. & Y. R.R. v. United States*, 586 F.2d 29, 32 (7th Cir. 1978) (court turned aside request for more than abbreviated notice to announce nonconcurrence in not yet effective joint rates); *Crete Carrier Corp. v. United States*, 577 F.2d 49, 50 (8th Cir. 1978) (court turned aside request for an oral hearing and cross-examination on a petition to set aside a grant of operating authority).

148. 580 F.2d 55 (3d Cir. 1978).

incorporate by reference the findings of the administrative law judge.<sup>149</sup> Here, the court reversed its earlier position.

[Although *Vermont Yankee*] dealt with a factual and administrative context different from that here and, in particular, involved the review of rule-making, rather than adjudicatory procedures, it expresses the basic philosophy that agencies should be relatively free to establish their own procedures and mechanisms for decision-making on subjects within the scope of their expertise.<sup>150</sup>

As a result, the "spirit of *Vermont Yankee* must be given attention," and a separate statement of reasons would not be required.<sup>151</sup>

There is greater evidence in the courts of appeals than in the district courts of a willingness to give *Vermont Yankee* less controlling weight. Virtually none of those cases has involved informal rulemaking, however, and in those cases that do involve judicial review of informal rulemaking, most of the courts choosing not to follow *Vermont Yankee* have tended to distinguish the case rather than disparage or reject it. The distinction drawn by these latter courts is one between judicial imposition of procedures in excess of those required for informal rulemaking by § 553 of the APA, clearly forbidden by *Vermont Yankee*, and a judicial requirement

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149. *Id.* at 62.

150. *Id.*

151. *Id.* For cases in which other courts of appeals follow the Third Circuit's lead in *Kenworth Trucks*, see *NLRB v. Windsor Indus., Inc.*, 730 F.2d 860, 866 (2d Cir. 1984) (court saw "no reason to take a different view"); *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772, & n.11 (5th Cir. 1978) (NLRB had refused to reopen a case for the taking of evidence concerning employee turnover during the time between the administrative law judge's decision and the Board's review of that decision; reviewing court was reluctant to impose a requirement that would "seriously interfere with [the Board's] established procedures, noting that *Vermont Yankee* is a "reaffirmation of the general principle that courts of appeal should not interfere with agency procedure." The court did observe that there may be situations where the Board might be required to reopen "to proceed fairly," but that there was insufficient evidence to do so here); see also *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 48 (1st Cir. 1981) (*Vermont Yankee* joins *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), as authority for the proposition that the scope of judicial review over bargaining orders is confined to a determination of whether the relevant factors have been considered, with the weight to be given the factors left to the agency even if the court disagrees); *NLRB v. Living and Learning Centers, Inc.*, 652 F.2d 209, 214 (1st Cir. 1981) (same as *Big Y Foods*). All of these cases are concerned with judicial review of NLRB adjudicatory procedures. *Vermont Yankee* thus seems established as a factor in review of this agency's procedures.

Courts of appeals also have cited *Vermont Yankee* for the proposition that the judiciary is not to interfere once it is determined that the statutory criteria have been met for appointment of receivers for ailing financial institutions. *Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 720 F.2d 1499, 1504 (11th Cir. 1983) (citing *Telegraph Savings & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 564 F. Supp. 862, 875-76 (N.D. Ill. 1981), *aff'd sub nom.* *Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983)) (the wisdom of the exercise of the power to appoint a receiver is not subject to reexamination under the guise of judicial review), *cert. denied*, 104 S. Ct. 2656 (1984).

that the agency's record, produced by procedures chosen by the agency, when judicially reviewed under the appropriate standard,<sup>152</sup> rationally support the rule. Thus, these courts seem to say that, notwithstanding *Vermont Yankee's* mandate that choice of procedure to develop the necessary record must be left to the agency, the courts retain a right of substantive review to determine whether the necessary record has been developed. If the procedures chosen by the agency fail to produce the necessary record, that is to provide rational support for the adoption of a rule, the court may invalidate the rule and remand to the agency for development of an acceptable record. The agency may then choose to repeat the same procedures that it originally chose to use and hope that the reviewing court will now find the record adequately supports the agency decision, or the agency may choose to use more extensive procedures than the minimum required by § 553 of the APA, thus producing a more extensive record, and perhaps then satisfying a reviewing court.

In *National Crushed Stone Association, Inc. v. EPA*,<sup>153</sup> for example, the Fourth Circuit reviewed EPA rules concerning the discharge of pollutants by point sources of crushed stone, sand, and gravel. The court held the rule's suspended solids limits invalid and remanded for reconsideration. The court indicated that under *Vermont Yankee* the agency was free to fashion its own procedures and that the APA imposed maximum mandatory procedures,<sup>154</sup> but noted that "courts are no longer satisfied with bare administrative ipse dixits, and the Agency must make reasoned decisions with full articulation of the reasoning and take into account all relevant factors."<sup>155</sup>

The rule was remanded, however, both because the agency failed to give its reasoning and because the agency failed to provide an opportunity for interested persons to respond to certain data upon which the agency relied.<sup>156</sup> The first reason for remand hardly represents a rebellion against the principles of *Vermont Yankee* in rulemaking. Had the court stopped there, its holding would have been consistent with *Vermont Yankee*. In requiring that the agency provide an opportunity for interested persons to respond to data upon which the agency relied, however, the court overstepped the boundary set by *Vermont Yankee*, effectively imposing procedures upon an agency.

In *National Industrial Sand Association v. Marshall*,<sup>157</sup> the Court of Appeals for the Third Circuit utilized reasoning similar to that used by the Fourth Circuit in *National Crushed Stone*. The court reviewed the

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152. The appropriate standard for judicial review of informal rulemaking is whether the record provides rational support for the agency decision, that is, that the decision was not arbitrary and capricious. See 5 U.S.C. § 706(2)(A) (1982).

153. 601 F.2d 111 (4th Cir. 1979), *rev'd*, 449 U.S. 64 (1980).

154. *Id.* at 116.

155. *Id.*

156. *Id.* at 118.

157. 601 F.2d 689 (3d Cir. 1979).

Secretary of Labor's training rules for mining companies and in its discussion of the scope of its review stated:

We must also be mindful of the teachings of the Supreme Court in *Vermont Yankee* . . . . The principal thrust of that decision was to discourage the courts of appeals from engrafting procedural requirements on the rulemaking standards established under . . . the APA, 5 U.S.C. sec. 553. Beyond this, the Court did not specifically condemn the "hard look" doctrine.<sup>158</sup>

Yet the court eventually upheld the rules. As did the Fourth Circuit in *National Crushed Stone*, all the Third Circuit seems to have been indicating is that the primary thrust of *Vermont Yankee* is to control judicial imposition of additional procedures and not the ability of the courts to examine with care what the agency has done.

Some cases involving judicial review of administrative action other than informal rulemaking have dealt with *Vermont Yankee* in similar fashion. In *East Texas Motor Freight Lines, Inc. v. United States*,<sup>159</sup> a case involving review of an Interstate Commerce Commission order granting a carrier temporary authority to carry commodities, the ICC argued that it was not required to provide full findings and explanation of its decision and the court could not impose such in light of *Vermont Yankee*.<sup>160</sup> The court found that the agency still should "explain its results," that this would pose "no intolerable burden," and that:

We do not think that *Vermont Yankee* prevents this court from remanding for an administrative explanation in an appropriate case. The Court did not purport to address the principle that in order to preserve effective review, a court should demand a reasoned decision from an administrative agency. Unlike *Vermont Yankee*, the concern in this case is not with the adequacy of administrative fact-finding but the effectiveness of judicial review. Also, the judicial intrusion in this case would be minimal: a remand would not require the ICC to reconsider the decision it has made, but only articulate some reasons.<sup>161</sup>

The court concluded that although the ICC's failure fully to articulate its reasons for granting authority made review difficult, the court was nevertheless able to effectively employ the applicable scope of review,<sup>162</sup> and affirmed.<sup>163</sup>

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158. *Id.* at 699 n.35.

159. 593 F.2d 691 (5th Cir. 1979).

160. *Id.* at 695.

161. *Id.* at 695 n.7 (dictum).

162. *Id.* at 698 (the "case [was] not an example of the administrative process at its best.").

163. *Id.*; see also *Saylor v. USDA*, 723 F.2d 581 (7th Cir. 1983). In this appeal from an adjudicatory proceeding in which the USDA suspended a registrant under the Packers and Stockyards Act, the court remanded for "lack of a clear statement of reasons" and commented, "we recognize that we may not impose procedural



*NLRB v. Permanent Label Corp.*<sup>164</sup> involved a petition by the NLRB for enforcement of its bargaining order.<sup>165</sup> The Third Circuit ordered enforcement, but one concurring judge, nonetheless, felt that the majority erred in "its wrongful assumption of authority to promulgate an essentially procedural rule" in requiring a statement of reasons in support of the bargaining order and that this ignored "the Supreme Court's admonitions" in *Vermont Yankee*.<sup>166</sup> Other judges, concurring in part and dissenting in part, defended the majority's requirement of a statement of reasons, noting:

Requiring the Board to articulate its reasons for imposing a bargaining order does not represent an unwarranted judicial interference with administrative procedure . . . . This basic requirement which focuses on effective judicial review cannot be deemed to constitute an undue burden on the Board, and does not intrude upon internal Board procedures in a manner proscribed by the principle expressed in *Vermont Yankee*.<sup>167</sup>

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requirements in excess of those demanded by the APA. *Vermont Yankee* . . . . However, the Supreme Court recently made clear that *Vermont Yankee* was not meant to abrogate the responsibility of agencies to 'cogently explain' their decisions. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, — U.S. — 103 S. Ct. 2856, 2869-71, 77 L. Ed. 2d 443 (1983)." *Id.* at 584; accord *Lopez v. Heckler*, 725 F.2d 1489, 1496-97 (9th Cir. 1984) (use of injunctive relief to control methods of determining social security benefits "does not raise issues of judicial interference in administrative agencies' discretion to formulate their own procedures" because here the question is one of the "executive branch defying the courts"); *National Wildlife Fed'n v. Marsh*, 721 F.2d 767, 784-86 (11th Cir. 1983) ("The applicable procedure established by the Corps within the meaning of *Vermont Yankee* is one of contemporaneous application for all required permits"; therefore, the court was not interfering with established procedures or imposing additional ones); *Artukovic v. Immigration and Naturalization Serv.*, 693 F.2d 894, 897-99 (9th Cir. 1982) (reopening rather than reconsideration was required under due process to afford hearing in revocation of stay of deportation, notwithstanding deference to the agency's procedural rules under *Vermont Yankee*).

164. 657 F.2d 512 (3d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982). *But see* *Kenworth Trucks of Philadelphia, Inc. v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978) (court indicated that although *Vermont Yankee* "dealt with a factual and administrative context different from that here and, in particular, involved the review of rule-making rather than adjudicatory procedures . . .," the court nevertheless felt constrained by the "spirit of *Vermont Yankee*" to impose a separate statement of reasons requirement in bargaining order proceedings).

165. *Permanent Label Corp.*, 657 F.2d at 512.

166. *Id.* at 522-24.

167. *Id.* at 532 (Garth, Hunter, Weiss, J.J., concurring in part, dissenting in part); *see also* *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir. 1981) (court concluded that the administrative law judge, in denying an application for concurrent social security benefits, must indicate the evidence rejected as well as make findings upon the evidence received. The dissent believed that Congress should provide the standard, and, invoking *Vermont Yankee*, stated: "I do not agree with the majority's attempt to 'engraft [its] own notions of proper procedure upon [this agency which is] entrusted with substantive functions by Congress.'" *Id.* at 708 (Garth, J., dissenting in part)). In a subsequent bargaining order case, Judge Garth dissented again, noting that "Judge Adams [sic] reliance on *Vermont Yankee* to support his and the majority's position that the Board should not be required to do more than it did here is a

Yet, in each of these cases it cannot be said that *Vermont Yankee* was brushed aside. Perhaps the most significant aspect of *East Texas Motor Freight Lines, Inc. v. United States*<sup>168</sup> and *NLRB v. Permanent Label Corp.*<sup>169</sup> is that neither involved judicial review of agency rulemaking. The judicial review in these cases was of adjudications. *Vermont Yankee*, on its facts, involves judicial review only of rulemaking, not of adjudication.<sup>170</sup> The *East Texas Motor Freight Lines* and *Permanent Label* courts therefore might have found *Vermont Yankee* inapplicable to judicial review of adjudication, and hence felt free to impose procedures upon agencies for their adjudications. Yet, they did not do so, but indeed were careful to avoid judicial imposition of procedure upon agency adjudications. These courts thus implicitly held that the *Vermont Yankee* rule applies, not only to judicial review of rulemaking, but also to judicial review of adjudication. Thus, these cases, like the rulemaking cases of *National Crushed Stone Association, Inc. v. EPA*<sup>171</sup> and *National Industrial Sand Association v. Marshall*<sup>172</sup> drew a distinction between the forbidden judicial imposition of procedures upon an agency, and the courts' right, upon review of an agency decision, to demand an adequate record that rationally supports the agency decision. These cases, therefore, cannot be said to represent resistance to *Vermont Yankee*, and are examples of the much more common phenomenon, that of citing *Vermont Yankee* where it is probably neither required nor necessary.<sup>173</sup> Thus, the picture

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misapplication of the principles prescribed by the Supreme Court in that case. In *Vermont Yankee* the Supreme Court held that reviewing courts could not compel administrative agencies engaged in *rulemaking* to adopt procedures prescribed by a court in addition to those provided in the Administrative Procedure Act. In the instant action, the issue is whether this court should require the Board to provide us with a sufficient explanation and articulation for its choice of remedy — i.e., a bargaining order — in a dispute resolved through *adjudication*." *NLRB v. Eastern Steel Co.*, 671 F.2d 104, 115 n.2 (3d Cir. 1982) (Garth, J., dissenting).

168. 593 F.2d 691 (5th Cir. 1979).

169. 657 F.2d 512 (3d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982).

170. See *supra* notes 6-20 and accompanying text.

171. 601 F.2d 111 (4th Cir. 1979), *rev'd*, 449 U.S. 64 (1980).

172. 601 F.2d 689 (3d Cir. 1979).

173. For another example of a court of appeals citing *Vermont Yankee* when it is unnecessary, see *Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978). In *Caswell*, the court agreed with a district court order requiring that social security disability hearings be held within 90 days of a request. Although the court conceded that the agency has discretion in setting hearings, that the applicable statutes did not define what is a reasonable time, that Congress had not said that the delays at issue were unreasonable, and that Congress "must bear the ultimate responsibility for remedying problems in the administration of federal programs . . . under *Vermont Yankee*," it said that the judiciary still has a role that includes devising appropriate remedies. Thus, it was willing to support judicial imposition of time limits on these agency proceedings. *Id.* at 15-17. See also *Day v. Schweiker*, 685 F.2d 19, 22 (2d Cir. 1982), *vacated*, *Heckler v. Day*, 104 S. Ct. 2249 (1984); cf. *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 972 (8th Cir. 1983) (The court was "well aware that in formulating equitable relief the courts must proceed gingerly and not encroach on traditional administrative practices," but courts may fashion "relief commensurate to the harm.").

in the courts of appeals other than the D.C. Circuit is similar to that in the district courts.

### C. "The D.C. Circuit"

One of the early commentaries on *Vermont Yankee* was written by Judge Anton Scalia, now of the Court of Appeals for the District of Columbia Circuit.<sup>174</sup> His article was sharply critical of his future colleagues on that court which, he observed, "had been, to put it mildly, a remarkably ineffective instrument for implementing the underlying principles of interpretation which the [pre-*Vermont Yankee*] Supreme Court opinions [in administrative law] quite clearly expressed."<sup>175</sup> He believed "the [Supreme] Court felt, as an institution, that its authority had been flouted," and that *Vermont Yankee* was intended to deal with the problem.<sup>176</sup>

Judge Scalia examined the early evidence of the D.C. Circuit's response and reaction to *Vermont Yankee*, and concluded at the time that it "flouts the Supreme Court's guidance . . . ."<sup>177</sup> He commented: "A tongue-lashing having failed, it will be interesting to see what further steps the Supreme Court may take to bring the D.C. Circuit into line."<sup>178</sup>

Examination of post-*Vermont Yankee* decisions of the Supreme Court, as indicated previously, discloses that it has done little more than confirm the general principles of the opinion.<sup>179</sup> There is no indication that the Court has taken particular offense at what has transpired in the lower federal judiciary in general, or in the D.C. Circuit in particular. The explanation for this may be that later treatment of *Vermont Yankee* by the D.C. Circuit reveals patterns of neither wanton disregard nor cheerful obedience. In that regard the judicial record in the D.C. Circuit is mixed, yet it is qualitatively distinct from that in the district courts and the other courts of appeals.

The D.C. Circuit reacted to *Vermont Yankee* and its implications in a variety of ways. It has followed it, distinguished it, debated it, and, on occasion, undermined it. For example, in remanding a rate-making or-

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174. Scalia, *supra* note 38.

175. *Id.* at 363.

176. *Id.* at 370-71; see Friendly, Book Review, 8 HOFSTRA L. REV. 471, 482 (1980) (reviewing K.C. DAVIS, 1 & 2 ADMINISTRATIVE LAW TREATISE (2d ed. 1978, 1979) (Judge Friendly described *Vermont Yankee* as the "Supreme Court's resentment of the hubris of the District of Columbia Circuit's imposing procedural requirements on informal rulemaking beyond those specified in the APA"); Note, *Administrative Law - Vermont Yankee "Maximum Procedural Requirements" Rule*, 27 U. KAN. L. REV. 500, 508 (1979) (*Vermont Yankee* in its "narrowest sense" was a "letter to Judge Bazelon" of the D.C. Circuit, "as an unequivocal rejection of the role he envisioned for the courts").

177. Scalia, *supra* note 38, at 396-99. Judge Scalia focused on the decision in *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978). See *infra* text accompanying notes 301-10 for a discussion of this case.

178. Scalia, *supra* note 38, at 400.

179. See *supra* text accompanying notes 41-55.

der to the Federal Energy Regulatory Commission for failure to apply the proper legal criteria, Judge Leventhal offered a number of suggestions as to how the agency might exercise its discretion in selecting alternative procedures,<sup>180</sup> and emphasized:

that while the court has identified a number of factors for consideration by the Commission, it is aware that the appraisal and weighing of these factors is the function of the agency and not the court. It is not an encroachment on the agency's ultimate discretion either that the court has identified a number of factors for consideration or . . . a particular emphasis should be given a certain factor.<sup>181</sup>

In another opinion reviewing a challenge to a Federal Maritime Commission order after remand, in part because of the agency's refusal to consider events subsequent to its initial order, Judge Wright observed:

We emphasize that our earlier opinion expressly stated that the Commission had no duty to provide full "evidentiary" hearings. We have no wish to straightjacket the agency with procedural requirements unrelated to its responsibilities. Still, the Commission must perform its duties with a full understanding of the economic and commercial situation. We cannot find that the Order on Remand, reached without consideration of then-current industry conditions or agency policy, was based on a review of relevant factors.<sup>182</sup>

In both cases the court reviewed agency action with an eye to *Vermont Yankee*, but without abdicating all judicial responsibilities.

The course of *Vermont Yankee* upon remand is perhaps the best example of the possibility of continuing confrontation between the D.C. Circuit and the Supreme Court. Judge Bazelon, writing for the majority, stated that *Vermont Yankee* "held that if an agency complies with the procedures required by statute, a rule may be struck down because of procedural shortcomings only in unusual circumstances. The Supreme Court agreed, however, that the Rule should be vacated if it lacks support in the administrative record . . . ."<sup>183</sup> He said that the court's duty was only to review the rules "on their faces — not the procedures that produced them" and that he was not judging whether nuclear power was good or bad.<sup>184</sup> The court nevertheless found the rules invalid for failure

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180. *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n*, 606 F.2d 1094, 1119-21 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980).

181. *Id.* at 1121.

182. *Seatrains Int'l, S.A. v. Federal Maritime Comm'n*, 598 F.2d 289, 295 (D.C. Cir. 1979).

183. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 470 (D.C. Cir. 1982), *rev'd sub nom.* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 103 S. Ct. 2246 (1983).

184. *Id.* at 475 n.75.

to consider certain matters, including health and socioeconomic issues, as well as the cumulative effects of fuel cycle activity.<sup>185</sup>

The appearance is one of consistency with *Vermont Yankee*; that the judge received the Supreme Court's "letter to Judge Bazelon."<sup>186</sup> Judge Wilkey dissented. He commented that Judge Bazelon adopted, for the majority, the "too hard a look" doctrine and "if there was ever a doubt prior to today, it is now clear this court is committed to an assumed role as high public protector of all that is good from perceived evils of nuclear power."<sup>187</sup> He felt that Judge Bazelon was looking to assess procedural compliance and in the process dictated "just how this consideration is best made."<sup>188</sup> He concluded that the court "has taken no more than a great step sideways from an analysis rejected unanimously by the Supreme Court" in *Vermont Yankee* and [has] "effectively taken over control of the nuclear industry."<sup>189</sup>

Perhaps the conflict between the Supreme Court and the D.C. Circuit concerning the proper role of the judiciary in the review of administrative action continues. The more complete judicial record merits examination.

In a case in which the D.C. Circuit reviewed EPA rules on the issuance of orders for primary nonferrous smelters it was asked to order cross-examination of an economist. It declined on the basis of *Vermont Yankee* and stated that the "Supreme Court has made clear . . . that courts must be particularly reticent about going beyond the procedures established by Congress and in requiring agencies to provide additional rulemaking procedures."<sup>190</sup>

Several other decisions of the D.C. Circuit reveal similar acceptance of the case without evidence of overt resistance. One issue in a challenge to the Civil Aeronautics Board's rules on domestic air cargo transport was whether the Board had allowed adequate time for oral argument. The court had no difficulty concluding that, in light of *Vermont Yankee*, "there is no basis for requiring the Board to go beyond the requirements of the APA."<sup>191</sup>

In another case involving the EPA's standards for lead in ambient

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185. *Id.* at 494.

186. Note, *supra* note 177, at 508.

187. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 685 F.2d 459, 517 (D.C. Cir. 1982) (Wilkey, J., dissenting), *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983).

188. *Id.* at 537.

189. *Id.* at 545; *see also* Public Sys. v. Federal Energy Regulatory Comm'n, 606 F.2d 973, 984 (D.C. Cir. 1979) (Robb, J., dissenting) ("The thesis of the majority is untenable in light of the Supreme Court's recent decision in *Vermont Yankee* . . .").

190. Kennecott Corp. v. EPA, 684 F.2d 1007, 1020 n.33 (D.C. Cir. 1982). The court was influenced by the fact that Congress had considered and rejected cross-examination in this type of EPA rulemaking. *Id.*

191. National Small Shipments Traffic Conference v. Civil Aeronautics Bd., 618 F.2d 819, 834 n.41 (D.C. Cir. 1980).

air, the court was unwilling to order the agency to allow cross-examination of medical and scientific witnesses who had testified at the public hearing held on the proposed rules.<sup>192</sup> *Vermont Yankee* has had a similar influence in cases involving efforts to have the court impose separation of function requirements,<sup>193</sup> cost/benefit analysis,<sup>194</sup> additional procedures with respect to agency subpoenas,<sup>195</sup> mandatory inclusion of related issues in a single rulemaking proceeding,<sup>196</sup> reopening, and limitations on ex parte contacts.<sup>197</sup>

One area in which *Vermont Yankee* has had noticeable impact upon the D.C. Circuit is in that of exempt rulemaking. The idea that courts could impose notice-and-comment procedures in the promulgation of rules otherwise exempt from the procedural requirements of § 553 of the APA had been applied, before *Vermont Yankee*, when the rule was deemed to have "substantial impact on the rights and interests of private parties."<sup>198</sup> *Vermont Yankee* has led the D.C. Circuit to conclude that this form of judicial activism is no longer permissible. In *Cabais v. Egger*,<sup>199</sup> the court observed that "substantial impact" is an insufficient justification to require notice and comment if a rule is otherwise exempt, and that it is not "an independent basis for determining the applicability of APA procedures . . . ."<sup>200</sup> In *Cabais*, most of the agency's directive was found to be interpretative, and therefore not subject to notice and comment by the explicit terms of § 553 of the APA.<sup>201</sup> The court reached the same result in *American Postal Workers Union v. United States Postal Service*.<sup>202</sup> It declined to apply the "substantial impact" test,<sup>203</sup> and "decline[d] to require OPM to engage in procedures not required by the APA" in light of *Vermont Yankee*.<sup>204</sup> The court would do

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192. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1169-71 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

193. *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1212-14 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

194. *American Fed'n of Labor v. Marshall*, 617 F.2d 636, 665 n.167 (D.C. Cir. 1979) ("[T]his court may not require OSHA to conduct cost-benefit analysis unless the agency or Congress officially requires the procedure. Such analysis is certainly not mandated in explicit terms by the statute. Nor is it implicated in the extra-statutory procedures OSHA followed . . . ."), *aff'd in part, rev'd in part sub nom.* *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).

195. *FTC v. Brigadier Indus. Corp.*, 613 F.2d 1110, 1115-16 (D.C. Cir. 1979).

196. *Earth Resources Co. v. Federal Energy Regulatory Comm'n*, 617 F.2d 775, 777-79 (D.C. Cir. 1980) (claim was that consideration of one issue in the present rulemaking proceeding would render later hearings on other issues meaningless).

197. *Sierra Club v. Costle*, 657 F.2d 298, 397-404 (D.C. Cir. 1981).

198. *Batterton v. Marshall*, 648 F.2d 694, 708 n.83 (D.C. Cir. 1980). See *supra* text accompanying notes 63-73, and 112-18 for a discussion of the recent course of the "substantial impact" test in the district courts and other courts of appeals.

199. 690 F.2d 234 (D.C. Cir. 1982).

200. *Id.* at 237.

201. *Id.* at 237-38.

202. 707 F.2d 548 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984).

203. *Id.* at 560.

204. *Id.* at 565 n.11.

no more than suggest that notice and comment was "advisable," although not required.<sup>205</sup>

Today the expected result is that once the determination is made that a rule is exempt, the inquiry ends—that is, the court will not impose notice and comment.<sup>206</sup> *Stewart v. Smith* concerned a challenge to the Bureau of Prisons's policy of considering only persons under the age of thirty-five for jobs within correctional facilities.<sup>207</sup> One assertion was that the policy was procedurally defective because it had not been promulgated by notice and comment procedures. The court concluded that the policy was exempt, stating: "The desirability of procedural safeguards . . . is not the issue in this case. Instead the question before us is simply whether the APA required notice and comment rulemaking when this policy was formulated. If it did not, we cannot invalidate this maximum age rule. See *Vermont Yankee* . . . ." <sup>208</sup>

At the other end of the spectrum, the D.C. Circuit will not hesitate to perform traditional judicial functions in the review of rulemaking.

Because the Commission intimates that its procedural decisions are insulated by the Supreme Court's recent decision in *Vermont Yankee* . . . it is worth noting the holding in that case . . . . Thus the case restricts the ability of courts to refashion normal rulemaking procedures with judicially-conceived notions of administrative fair play. It has no bearing on the power of courts to interpret and apply congressional directives.<sup>209</sup>

The Court of Appeals for the D.C. Circuit will not allow, for example, assertions of the principles of *Vermont Yankee* to bar it from performance of the traditional functions of judicial review. If an agency's explanation of the basis for its decision is inadequate or fails to address alternatives that it reasonably should have, the court will remand for further consideration,<sup>210</sup> notwithstanding that *Vermont Yankee* does not allow the court the "power to contest the rationality of the substantive decisions . . . ." <sup>211</sup>

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205. *Id.* at 564-65.

206. See *infra* text accompanying notes 273-77 for a discussion of *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) in which Judge Bazelon found it unnecessary to reject the "substantial impact" test and suggested it may still provide a basis for analysis of the question of availability of a statutory exemption.

207. 673 F.2d 485 (D.C. Cir. 1982).

208. *Id.* at 496 n.37. Judge Wright dissented on the ground that the policy did not fall within the APA exemption for "matter[s] relating to agency management or personnel." *Id.* at 500-06.

209. *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 619 n.10 (D.C. Cir. 1979) (issue of propriety of ex parte contacts in rulemaking not ripe for judicial review).

210. *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815-17 (D.C. Cir. 1983) (repeal of rule containing restrictions on "homework" in the knitted outerwear business).

211. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413,

The APA itself may provide the basis for such decisions, since it requires a statement of basis and purpose with the final rule.<sup>212</sup> If the court is simply carrying out the intent of Congress as expressed by the APA's requirement of a statement of basis and purpose, then there is no conflict with *Vermont Yankee*.<sup>213</sup>

The more difficult and interesting aspects of response and reaction to *Vermont Yankee* in the D.C. Circuit lie between those cases in which *Vermont Yankee* clearly has been followed and those in which it clearly need not be. Here is where one is likely to discover, if at all, the resistance which Judge Scalia predicted and lamented.<sup>214</sup>

The exceptions to *Vermont Yankee*<sup>215</sup> have been considered by the court in several cases. In *Lead Industries Association v. EPA*,<sup>216</sup> one challenge involved the agency's denial of cross-examination of medical and scientific witnesses who testified at the hearing on the EPA's proposed rules.<sup>217</sup> The court rejected the argument that it should intervene on the basis of the *Vermont Yankee* exceptions. Judge Wright observed that the petitioner has an "extremely heavy burden in its attempt to persuade the court to impose on EPA a procedure that is not required by statute" and that it is "absolutely clear that courts must be extremely reticent."<sup>218</sup>

In another claim for additional requirements in rulemaking, Judge Wright again discussed the *Vermont Yankee* exceptions. In this instance, the assertion was that Occupational Safety and Health Administration (OSHA) staff attorneys who were advocates for an OSHA rule had been consulted by the decisionmaker in development of the final rule.<sup>219</sup> The court examined the APA and the OSHA enabling statute and could "discern no statutory basis in either the APA or the Occupational Safety and Health Act for a separation of function requirement in OSHA rulemak-

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1440 n.86 (D.C. Cir. 1983) (remanded in part for the agency to give adequate consideration to the issue of elimination of program logs.).

212. *Independent United States Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918-20 (D.C. Cir. 1982); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024 n.11 (D.C. Cir. 1978); Note, *The Need For an Additional Notice and Comment Period When Final Rules Differ Substantially from Interim Rules*, 1981 DUKE L. J. 377, 388 (*Vermont Yankee* does not preclude imposition of additional procedures in furtherance of section 553 purposes).

213. *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981), offers a combination of the issues of adequacy of the statement of reasons and of exempt rulemaking. It was argued that the APA required more stringent and independent findings than the underlying statute, the Outer Continental Shelf Lands Act. The court disagreed, noting that the underlying statute did have a reasons requirement, that it saw "no need to engraft other provisions onto those found in this comprehensive statute," and that the rules were in any event exempt from the APA in that they related to public property. *Id.* at 1322 n.154.

214. See *supra* text accompanying notes 174-78.

215. See *supra* text accompanying notes 20-22.

216. 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980).

217. *Id.* at 1169-71 (rules concerned lead in ambient air).

218. *Id.* at 1169.

219. *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1210 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).



ing, and under the Supreme Court's decision in *Vermont Yankee*, that is virtually the end of the inquiry."<sup>220</sup> The judge noted that this finding does not end the matter entirely if due process rights are violated or if there are " 'extremely compelling circumstances' in which the courts remain free to impose nonconstitutional extra-statutory procedures on agencies."<sup>221</sup> Nevertheless, the court was not inclined to explore the exceptions; rather, it looked to the *Home Box Office — U.S. Lines* precedents,<sup>222</sup> which it felt had survived *Vermont Yankee*, distinguished those cases on the ground that neither involved improper influence or ex parte contacts with agency staff members and the decisionmakers, and concluded that the rule was procedurally correct.<sup>223</sup>

*Lead Industries Association* and *United Steelworkers of America v. Marshall*<sup>224</sup> illustrate that the D.C. Circuit has neither invoked nor probed the exceptions to *Vermont Yankee* as a means of achieving what the Supreme Court prohibited. Further evidence of this can be found in cases concerning other EPA rules,<sup>225</sup> Federal Energy Regulatory Commission design specifications for the Alaskan natural gas transmission system,<sup>226</sup> and directives concerning statutory requirements that states offset unemployment compensation payments by the amount of pension or retirement benefits received by unemployed claimants.<sup>227</sup>

One possible means of limiting the impact of *Vermont Yankee* is to

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220. *Id.* at 1212-14.

221. *Id.* at 1214.

222. See generally *infra* text accompanying notes 278-316.

223. *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1214 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

224. *Id.*

225. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). The court stated that it would reverse only if "the statutory requirements, or the procedures reasonably inferable from them or from basic notions of constitutional due process were breached by EPA" or there were substantial departures from statutory requirements. *Id.* at 392. It noted the general rule that there are no due process constraints in rulemaking, *id.* at 392 n.462, and refused to interfere with respect to comments received during the post-comment period, EPA's refusal to reopen the comment period, ex parte contacts with persons outside the agency, and intra-Executive branch meetings. *Id.* at 397-408.

226. *Earth Resources Co. v. Federal Energy Regulatory Comm'n*, 617 F.2d 775 (D.C. Cir. 1980). In the face of a claimed deprivation of due process because the agency decided certain issues in rulemaking in isolation from related issues, the court concluded that no protected liberty or property interest had been identified and small numbers of persons were not individually affected so as to justify invoking due process in rulemaking. *Id.* at 777-79. It observed:

Complainants' contention of 'piecemeal adjudication' does not actually state a due process claim, but rather an attack on the Commission's choice to structure its proceedings on an issue-by-issue basis. The Supreme Court has affirmed in the clearest terms that agencies have broad discretion to fashion their own procedures.

*Id.* at 778.

227. *Cabais v. Egger*, 690 F.2d 234 (D.C. Cir. 1982). The court was not willing to find that constitutional constraints or extremely compelling circumstances justified the imposition of notice and comment procedures in exempt rulemaking. *Id.* at 237 n.2.

construe it narrowly and confine it to its facts. The D.C. Circuit has done so on occasion. In *Las Cruces TV Cable v. FCC*,<sup>228</sup> which involved an agency acting in an adjudicatory context, the court put *Vermont Yankee* to the side by noting that the case warned the courts not to impose procedures beyond those required by the APA or desired by the agency in informal rulemaking and that, consequently, the case was not dispositive.<sup>229</sup> The court, however, still took from *Vermont Yankee* the guidance that it "serves to caution us against instructing the agency how to adjudicate a refund dispute without good reason."<sup>230</sup>

*Geller v. FCC*<sup>231</sup> presents a somewhat more subtle limitation of *Vermont Yankee*, one which may reveal inconsistency. *Geller* involved rulemaking, but the concern was not the internal workings of the process following proposal of the rule; rather, the issue was the FCC's denial of a rulemaking petition. The petitioner wanted the agency to reconsider, through rulemaking, an existing rule on cable television policies that he felt was no longer in the public interest because of changed circumstances.<sup>232</sup> The FCC denied the petition, but the court disagreed and ordered "that the Commission must reexamine the regulatory remnants of the consensus agreement [the original rule] for some discernable contribution to the public interest, and we leave to the Commission *in the first instance* the procedures through which that will be done."<sup>233</sup> The *Geller* court made clear that it did "not mean to imply that this inquiry must necessarily be conducted in a new rulemaking proceeding . . . ." <sup>234</sup> Concerning *Vermont Yankee*, it commented, "we do not encounter the strictures on imposition of judicially-created requirements on the rulemaking process recently highlighted in . . ." that case.<sup>235</sup>

The court in *Geller* thus alleviated the "*Vermont Yankee* problem" by confining the *Vermont Yankee* rule to prohibition of judicial interference only with the internal workings of the rulemaking process. The court's insistence that it was not requiring any particular procedural approach that the agency should follow on remand had the same effect. Its suggestion, however, that the choice belongs to the agency "in the first instance" seems inconsistent with the implication of *Vermont Yankee* that such choices are for Congress in the first instance, the agency in the last instance, and the courts nowhere in between. The effect of the *Geller*

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228. 645 F.2d 1041 (D.C. Cir. 1981).

229. *Id.* at 1049.

230. *Id.*

231. 610 F.2d 973 (D.C. Cir. 1979).

232. *Id.* at 976.

233. *Id.* at 980 n.59 (emphasis added).

234. *Id.*

235. *Id.* at 980 n.58; see also *ITT Communications, Inc. v. FCC*, 699 F.2d 1219, 1245-46 (1983) (In considering denial of a petition for rulemaking, the court distinguished between issues of discretion in fashioning additional rulemaking procedures, the agency's province under *Vermont Yankee*, and issues of statutory compliance in which the court has the responsibility of a more "exacting" review), *rev'd*, 104 S. Ct. 1936 (1984).

decision is to compel an agency "to exercise its discretion" to take an action that the agency does not consider necessary and desirable. The technique of limiting *Vermont Yankee* to its facts is an effective means for the court to retain an active, meaningful role in judicial review of agency decision making. Yet neither this technique nor its result — retaining a meaningful judicial review — seems judicially presumptuous.

In contrast, there have been numerous occasions in which the D.C. Circuit has examined and applied perceived notions of *Vermont Yankee* outside the context of informal rulemaking, and has in no sense limited the reach of the *Vermont Yankee* rule. In these cases, the court has done the opposite; this represents as much cooperation with the "spirit" of *Vermont Yankee* as one could reasonably expect, and more. *Vermont Yankee* has been cited as authority for a decision declining to require additional procedures with respect to the issuance of protective orders by the Federal Trade Commission,<sup>236</sup> for a decision reversing a district court's imposition of additional procedures in the Federal Aviation Administration's approval of a television antenna,<sup>237</sup> and for a decision refusing to impose additional procedures in the process of administrative approval of Postal Service rate increases.<sup>238</sup> There are many other such examples in the D.C. Circuit that implement the view extracted from *Vermont Yankee* that it is "well-settled that administrative agencies enjoy a broad discretion in the manner of carrying out their statutory functions and responsibilities,"<sup>239</sup> including in cases outside the context of

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236. *Exxon Corp. v. FTC*, 665 F.2d 1274, 1278-79 (D.C. Cir. 1981) (The court rejected the argument that an administrative law judge could not exercise the agency's protective order authority: "Provided the Commission's procedure for the issuance of protective orders is consistent with the governing statutes and the Constitution, as is patent in this case, it is not subject to further judicial review."); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (court dismissed arguments challenging the adequacy of a protective order and noted that "formulation of procedural rules is within the discretion of the agency, and our review is limited to determining consistency with governing statutes and the Constitution"); *accord FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980) (District court erred in imposing conditions on FTC subpoenas: "Agencies are free to determine their own procedures as long as they do not violate constitutional or statutory safeguards.").
237. *Aircraft Owners and Pilots Ass'n v. Federal Aviation Admin.*, 600 F.2d 965, 970 n.25 (D.C. Cir. 1979) (district court's remand in adjudication to require additional procedures "indirectly" violates the procedural discretion that Congress placed in the agency: "Additionally, requiring procedural safeguards not statutorily mandated violates the Supreme Court's prohibition . . ." in *Vermont Yankee*).
238. *National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 607 F.2d 392, 421 n.22 (D.C. Cir. 1979) (Tamm, J., concurring) (court must decline "to add the judicial veneer of a non-statutory requirement that the Governor find a PRC decision 'wholly acceptable' in order to approve it" and "may not require more than the minimum statutory procedures or impose procedures designed to achieve the 'best' result"), *cert. denied*, 444 U.S. 1025 (1980).
239. *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499 (D.C. Cir. 1980). The agency had approved amendment of a license permitting a municipal utility to raise the height of its dam, and initiated a separate proceeding to consider downstream consequences. The intervenors argued that the latter issue should have been addressed by reopening the initial proceeding rather than by open-

informal rulemaking.<sup>240</sup>

There is, however, more evidence of resistance to *Vermont Yankee* in the D.C. Circuit than in either the district courts or the other courts of appeals. Thus, the cases just described do not present the entire picture for proceedings other than rulemaking. In *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*,<sup>241</sup> the court remanded a ratemaking order because the agency had failed to apply the appropriate legal criteria.<sup>242</sup> In the portion of the opinion devoted to "Latitude on Remand," the court indicated that the agency had the discretion under the applicable statute "to use its equitable discretion and to choose alternative procedures or mechanisms to formulate and to effectuate its judgment."<sup>243</sup> Yet, the court then proceeded to offer a variety of suggestions as to how the agency might exercise its discretion,<sup>244</sup> emphasizing:

that while the court has identified a number of factors for consideration by the Commission, it is aware that the appraisal and

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ing a separate and subsequent proceeding. *Id.* at 509-10. Judge Wald, in dissent, agreed that *Vermont Yankee* cautions that fundamental policy questions are for Congress and not for the courts. He nevertheless felt that the court could not meet its responsibility to review for consistency with legislative intent when "the decision itself was splintered" in more than one proceeding. *Id.* at 517-18.

240. *City of Ukiah v. Federal Energy Regulatory Comm'n*, 729 F.2d 793, 799 (D.C. Cir. 1984) (dictum) (evidentiary hearing was not required in issuance of an order allowing a county water authority to study the feasibility of operating a hydroelectric facility); *United Gas Pipe Line Co. v. Federal Energy Regulatory Comm'n*, 707 F.2d 1507, 1512 n.18 (D.C. Cir. 1983) (agency refused to waive its rule to allow automatic rate adjustments, and the court observed that "while we lack authority to command an agency to afford a petitioner a procedural opportunity not required by law, see *Vermont Yankee* . . . , the agency itself is not similarly limited."); *North Slope Borough v. Andrus*, 642 F.2d 589, 598 (D.C. Cir. 1980) (in an injunction proceeding involving lease of federal oil and gas properties, the court noted that "the Supreme Court [in *Vermont Yankee*] has warned of the impropriety of federal courts introducing additional procedural or substantive standards into statutory provisions for administrative action."); *Carolina, C. & O. Ry. v. ICC*, 593 F.2d 1305, 1313 n.45 (D.C. Cir. 1979) (in ICC ratemaking, the court "contemplate[d] that the Commission will devise appropriately expedited procedures to avoid all escapable delay," although choice of hearing procedures was within the discretion of the agency "in the first instance"); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1055 (D.C. Cir. 1979) ("[A]s a general rule, the agency, not the court, enlarges the minimum procedures prescribed by statute."); *Porter County Chapter of the Izaak Walton League of Am., Inc. v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1369 n.15, 1372 (D.C. Cir. 1979) (in refusing to intervene in the agency's decision not to institute license revocation proceedings, the court, citing *Vermont Yankee*, noted that the agency has wide discretion in such matters); *In re FTC Line of Business Report Litigation*, 595 F.2d 685, 695-96, 696-97 n.55 (D.C. Cir.) ("The Commission exercised its discretion to permit greater procedural access to the decision-making process . . . than was required" in a proceeding that was investigatory and neither an adjudication nor a rulemaking, *cert. denied*, 439 U.S. 959 (1978).

241. 606 F.2d 1094 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980).

242. *Id.*

243. *Id.* at 1119.

244. *Id.* at 1120.

weighing of these factors is the function of the agency and not the court. It is not an encroachment on the agency's ultimate discretion either that the court has identified a number of factors for consideration . . . or a particular emphasis should be given a certain factor.<sup>245</sup>

The practical effect of the court's "suggestions" may well be to require indirectly what the court appears to feel it may not do directly without running counter to *Vermont Yankee*.

In other cases, the D.C. Circuit has been more direct. In *Independent U.S. Tanker Owners Commission v. Lewis*,<sup>246</sup> both the informal rulemaking and adjudicatory actions of the Maritime Administration were challenged.<sup>247</sup> On the informal adjudication aspects of the case, the court noted "the distinct and steady trend of the courts has been to demand in informal adjudications procedures similar to those already required in informal rulemaking."<sup>248</sup> It went on to point out that notwithstanding *Vermont Yankee*'s dictum "that courts may not add to the procedural requirements of the APA except in 'extremely rare' circumstances, we are justified in demanding some sort of procedures for notice, comment, and a statement of reasons as a necessary means of carrying out our responsibility for a thorough and searching review."<sup>249</sup>

In *Koniag, Inc. v. Andrus*,<sup>250</sup> the court relied on due process and the dictates of the underlying statute to reach a similar conclusion.<sup>251</sup> In *Koniag*, the Secretary of the Interior had decided that certain Alaskan villages were not entitled to lands and funds. The Secretary had considered the recommended decisions of the administrative law judge and the agency's appeal board and reached his decision before the recommendations were made available to the parties.<sup>252</sup> Even though this proceeding was not subject to the APA's requirements mandating an opportunity for comment and exceptions to the recommendations prior to the Secretary's final decision, the court nevertheless concluded that denial of these opportunities was improper.<sup>253</sup> Concerning *Vermont Yankee*, it stated:

The Supreme Court's recent decision . . . does not require a different result. In that case, the Court held that a reviewing court may not dictate to an agency the methods and procedures to be followed to develop an adequate record for judicial review . . . . Our holding today does not trench upon this principle. We hold only that the Secretary's secret review process is in-

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245. *Id.* at 1121.

246. 690 F.2d 908 (D.C. Cir. 1982).

247. *Id.*

248. *Id.* at 922.

249. *Id.* at 923.

250. 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

251. *Id.*

252. *Id.* at 608.

253. *Id.* at 609.

consistent with both constitutional constraints and the mandate of ANCSA [Alaska Native Claims Settlement Act] that Natives participate as fully as possible in the decisionmaking.<sup>254</sup>

In *Citizens for a Better Environment v. Gorsuch*,<sup>255</sup> the court considered the effect of *Vermont Yankee* in connection with judicial authority over consent decrees.<sup>256</sup> The district court had denied a motion to vacate a settlement agreement, and one issue on appeal was whether, by making the agreement itself, the court had improperly infringed upon the agency's discretion.<sup>257</sup> Specifically, the charge was that the district court's judicial decree dictated the approach to be taken in promulgating rules.<sup>258</sup>

The court found the decree to be largely the doing of the EPA and not the district court, that the latter's role had been confined to determining that the decree was fair and consistent with the statute, and that this did not conflict with *Vermont Yankee*.<sup>259</sup> Judge Wilkey, in dissent, said the power to adopt consent decrees is limited by statute, and that *Vermont Yankee* precludes judicial prescription of rules of procedure; thus, the majority had condoned "government by consent decree."<sup>260</sup>

It should be noted, however, that these cases and some others<sup>261</sup> that seem to set *Vermont Yankee* aside arose outside the confines of informal rulemaking procedures. In such cases there is danger of mistak-

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254. *Id.* at 610. Although the court did not explicitly make the point, it may have been acting consistently with *Vermont Yankee* under the theory of the "constitutional constraints" exception. It did quote the pertinent language from the Supreme Court's opinion. *Id.*

255. 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984).

256. *Id.*

257. *Id.* at 1120.

258. *Id.* at 1127.

259. *Id.* at 1128.

260. *Id.* at 1131, 1137.

261. *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 660 F.2d 773, 776-77 (D.C. Cir. 1980) (*per curiam*) (In a case challenging certain agreements between state and national political party committees, the majority found that the agreements violated the applicable statute, notwithstanding the agency's interpretation. In dissent, Judge Wilkey observed: "The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee* . . . ." *Id.* at 782 n.2.), *rev'd*, 454 U.S. 27 (1981); *Seatrains Int'l, S.A. v. Federal Maritime Comm'n*, 598 F.2d 289, 295 (D.C. Cir. 1979) ("We emphasize that our earlier opinion expressly stated that the Commission had no duty to provide full 'evidentiary' hearings. We have no wish to straight-jacket the agency with procedural requirements unrelated to its responsibilities. Still, the Commission must perform its duties with a full understanding of the economic and commercial situation. We cannot find that the Order on Remand, reached without consideration of then-current industry conditions or agency policy, was based on a review of all relevant factors."); *Public Serv. Comm'n v. Federal Energy Regulatory Comm'n*, 589 F.2d 542, 565 (D.C. Cir. 1978) (Robb, J., dissenting) (dissent asserted that the majority had involved itself in matters of policy which were the province of the agency and not the court, and which "were settled by the Commission when it established the optional procedure" in its order approving a certificate for a natural gas producer).

ing a legitimate distinction of inapposite precedent for resistance. This risk does not exist in certain D.C. Circuit rulemaking cases in which *Vermont Yankee* has been considered, and in those cases one can find evidence that the court, or at least some of its members, may be inclined to question the Supreme Court's teaching, and perhaps challenge its leadership in developing the law in this area.

*Weyerhaeuser v. Costle*<sup>262</sup> upheld the EPA's rules limiting effluent discharges, with the exception of certain rules pertaining to the paper industry.<sup>263</sup> Yet the court's opinion is laden with philosophic conflict with *Vermont Yankee*, which is a product of its perception of the general role of a court in judicial review of rulemaking. Thus, it suggested that a court may review procedures in rulemaking to make certain that they are "ample enough to support their substantive cargo."<sup>264</sup>

Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulations before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of its statutorily prescribed procedures . . . . Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from the country's historical reliance on the courts as the exponents of procedural fairness . . . . Recently, this reliance has transcended cases arising under either of the due process clauses and has infused modern notions of administrative law, in particular in the area of informal rulemaking . . . .

Our reliance on careful procedural review, moreover, derives from an expectation that if the Agency, in carrying out its 'essentially legislative task,' has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have "negate[d] the dangers of arbitrariness and irrationality in the formulation of rules . . . . Even here, however, beyond the notice, comment, and explanation requirements of section 553 of the APA, it is generally up to the Agency to select among the myriad available techniques to accomplish the goal of public understanding and participation. *Vermont Yankee* . . . ."<sup>265</sup>

In this setting *Vermont Yankee* seems more afterthought and counterpoint than it does controlling precedent.<sup>266</sup>

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262. 590 F.2d 1011 (D.C. Cir. 1978).

263. *Id.*

264. *Id.* at 1024 n.11.

265. *Id.* at 1027-28 (citations omitted).

266. *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980), also involved judicial review of EPA rules, in this instance new discharge source performance standards. The court found insufficient support in the rulemaking record and a need for a more adequate explanation. It indicated that the scope of its review "does not presage

Judge Bazelon's decision in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*,<sup>267</sup> *Vermont Yankee* on remand to the D.C. Circuit, and Judge Wilkey's dissent were discussed in the introduction to this section.<sup>268</sup> Judge Wilkey had suggested that the majority had adopted the "too hard a look" doctrine, in conflict with *Vermont Yankee*.<sup>269</sup> This was not the first time a colleague had accused the majority of taking "too hard a look" at the agency's rulemaking record. In *Public Systems v. Federal Energy Regulatory Commission*,<sup>270</sup> the court remanded an agency rule for failure to assess the implications of its actions and for failure adequately to explain its purposes.<sup>271</sup> Judge Robb dissented:

The court reaches its conclusion by asserting that 'substantial evidence' must support the 'factual predicate' on which the Commission rule is promulgated. It then invalidates the rule on the ground that it lacks adequate support in the record. To invalidate the Commission's order on this ground is, in effect, to reject the ordinary procedures of notice-and-comment rulemaking. Informal rulemaking does not necessarily involve either the creation of a record sufficient to withstand review under a substantial evidence standard or findings of the kind most susceptible to judicial review . . . .

The thesis of the majority is untenable in light of the Supreme Court's recent decision in *Vermont Yankee* . . . .<sup>272</sup>

Again, the judicial record indicates conflict in philosophy as to the proper role of the court in review of informal rulemaking.

Further evidence of this philosophical conflict is found in *Batterton v. Marshall*.<sup>273</sup> The Department of Labor failed to employ notice-and-comment procedures in adopting a new method to compute unemployment statistics, and the court held that the agency's action constituted a rule that was not exempt from APA procedures.<sup>274</sup> Judge Bazelon expressly distinguished *Vermont Yankee* on the ground that "in the instant case . . . the sole question is whether DOL employed the minimal proce-

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any new or more stringent standard" than the established "hard look" standard. *Id.* at 451. The court's discussion of the standard relies extensively on traditional pre-*Vermont Yankee* precedent without addressing the impact of *Vermont Yankee*. *Id.* at 451-54. The case has the air of "business as usual."

267. 685 F.2d 459 (D.C. Cir. 1982), *rev'd sub nom.* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 103 S. Ct. 2246 (1983).

268. See *supra* text accompanying notes 183-89.

269. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 517, 520-40 (D.C. Cir. 1982), *rev'd sub nom.* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 103 S. Ct. 2246 (1983).

270. 606 F.2d 973 (D.C. Cir. 1979).

271. *Id.*

272. *Id.* at 983-85 (Robb, J., dissenting).

273. 648 F.2d 694 (D.C. Cir. 1980).

274. *Id.* at 699-708.



dural requirements established by statute . . . ."<sup>275</sup>

This analysis alone seems apparently unremarkable in its relationship to *Vermont Yankee*. Although it seems consistent, dicta with respect to the possibility of employing the "substantial impact" test to impose notice and comment in otherwise exempt rulemaking suggests that the court's analysis strays from the principle, if not the strictly interpreted rule, of *Vermont Yankee*. As noted above,<sup>276</sup> other D.C. Circuit decisions indicate the demise of the "substantial impact" test as a basis for imposing additional procedures. In *Batterton*, Judge Bazelon refuses to reject it, at least as a means to determine whether the agency action is of a type that is exempt from the APA's notice and comment requirement:

DOL suggests in the instant case that the "substantial impact" test may put a court in the posture of appearing to require procedures beyond those mandated by statute or voluntarily adopted by the agency, and in that fashion deviate from the implications of *Vermont Yankee* . . . we do not rely on the "substantial impact" analysis. Nonetheless, we find no reason to doubt the continued viability of the "substantial impact" test, as it simply articulates one of the several criteria for evaluating claims of exemption from section 553.<sup>277</sup>

If Judge Bazelon were to use the substantial impact test as a means to find an otherwise exempt rule not exempt, and therefore subject to notice and comment, he would, in effect, have imposed procedures upon the agency — procedures that the agency had found unnecessary. Thus, the idea of imposing procedures in rulemaking obviously is not dead in all quarters.

One of the more celebrated examples of judicial imposition of non-statutory requirements in informal rulemaking is in the area of ex parte contacts. Under the APA, ex parte communications that are relevant to the merits of a rule between interested persons outside an agency and the decisionmakers within the agency are prohibited. If such communications nevertheless occur, they must be placed on the public record.<sup>278</sup> This provision does not, however, apply to informal rulemaking; it applies only in cases of formal adjudication and formal rulemaking.<sup>279</sup> That Congress did not apply this section to informal rulemaking is consistent with traditional notions of rulemaking procedure under which ex parte contacts had been an accepted and a lawful practice.<sup>280</sup>

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275. *Id.* at 707.

276. See *supra* text accompanying notes 198-208.

277. *Batterton v. Marshall*, 648 F.2d 694, 708-09 n.83 (D.C. Cir. 1980).

278. 5 U.S.C. § 557(d) (1982).

279. The procedures for formal rulemaking, that is, rulemaking "on the record after an opportunity for an agency hearing," 5 U.S.C. § 553 (1982), and for formal adjudication, 5 U.S.C. § 554 (1982), are set forth in 5 U.S.C. §§ 556-557 (1982).

280. *Action for Children's Television, Inc. v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977).

The legitimacy of ex parte contacts in informal rulemaking was altered dramatically in 1977. In *Home Box Office, Inc. v. FCC*,<sup>281</sup> the D.C. Circuit concluded:

Once a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding should 'refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision' . . . . If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.<sup>282</sup>

The court based its conclusion on several considerations, including the need for and "benefit of adversarial discussion among the parties,"<sup>283</sup> "the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law,"<sup>284</sup> and the fear of "one administrative record for the public and this court and another for the Commission and those 'in the know'."<sup>285</sup>

The implications of the case were immediately questioned in the D.C. Circuit itself. It has been suggested that *Home Box Office* was only "momentarily the law of the D.C. Circuit"<sup>286</sup> as a consequence of *Action for Children's Television, Inc. v. FCC*.<sup>287</sup> Although the latter did not overrule *Home Box Office*, it refused to apply it retroactively "inasmuch as it constitutes a clear departure from established law"<sup>288</sup> suggested that *Home Box Office* might be limited to rulemaking requiring "resolution of conflicting private claims to a valuable privilege,"<sup>289</sup> and perhaps confined it to ex parte contacts when "it appears from the administrative record under review that they may have materially influenced the action ultimately taken."<sup>290</sup>

*Vermont Yankee* placed the continuing vitality of *Home Box Office* in even greater doubt. Some commentators thought it was dead,<sup>291</sup> some

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281. 567 F.2d 9 (D.C. Cir. 1977).

282. *Id.* at 57 (citation omitted).

283. *Id.* at 55.

284. *Id.* at 56.

285. *Id.* at 54.

286. 1 K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 533 (1978).

287. 564 F.2d 458 (D.C. Cir. 1977).

288. *Id.* at 474.

289. *Id.* at 476.

290. *Id.*

291. E.g., Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White*

thought the contrary,<sup>292</sup> and some were understandably uncertain.<sup>293</sup> The D.C. Circuit's response has been mixed. In *Sierra Club v. Costle*,<sup>294</sup> the court refused to extend *Home Box Office*, and thus declined to invalidate an EPA rule that resulted from a proceeding which included ex parte contacts with individuals outside the agency after the close of the comment period.<sup>295</sup> In *Iowa State Commerce Commission v. Office of Federal Inspector*,<sup>296</sup> the court distinguished *Home Box Office* on its facts, and added that the ex parte contacts at issue "did not violate basic tenets of fairness."<sup>297</sup> In *United Steelworkers of America v. Marshall*,<sup>298</sup> the court was not willing to extend *Home Box Office* to "apply the ban on ex parte contacts to agency staff" dealings with OSHA decisionmakers in developing a standard for lead in the workplace.<sup>299</sup> Yet none of these cases expressly overruled *Home Box Office*; other decisions of the D.C. Circuit reveal that it is not likely to do so.

*United States Lines, Inc. v. Federal Maritime Commission*<sup>300</sup> concerned an order approving an amendment and extension of a joint service agreement between two water common carriers.<sup>301</sup> A competing shipper, United States Lines, petitioned for review and the D.C. Circuit remanded. One issue was the propriety of "secret ex parte contacts [that] were employed both to introduce new arguments and positions and to respond to and rebut arguments which protestant USL made in its public filings."<sup>302</sup>

Although the underlying statute provided for notice and a hearing, the court concluded that the hearing need not be formal and treated the FMC's decision as informal adjudication.<sup>303</sup> Thus, the proceeding was

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*House*, 80 COLUM. L. REV. 943, 976-78 (1980) (*Home Box Office* would seem to "fly in the face" of *Vermont Yankee*).

292. See, e.g., Preston, *A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex Parte Communications and Information Derived from Agency Files After Vermont Yankee?*, 32 AD. L. REV. 621, 625 (1982); Note, *Administrative Law — Administrative Procedure — Notice and Comment Rulemaking*, 1979 WIS. L. REV. 314, 331-32 (it is suggested that *Home Box Office* may survive because its due process underpinnings fall within *Vermont Yankee*'s "constitutional constraints" exception).

293. E.g., Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 214-15 (1981) ("The Supreme Court's decision in *Vermont Yankee*, invalidating judicial imposition of special procedures on agency rulemaking, compounds the uncertainty, especially inasmuch as the decision itself has an unclear future.").

294. 657 F.2d 298 (D.C. Cir. 1981).

295. *Id.* at 400-03.

296. 730 F.2d 1566, 1576 (D.C. Cir. 1984).

297. *Id.* at 1576.

298. 647 F.2d 1189 (D.C. Cir. 1981), *cert. denied*, 453 U.S. 913 (1981).

299. *Id.* at 1214. The majority also distinguished *Hercules, Inc. v. EPA*, 598 F.2d 91, 126-27 (D.C. Cir. 1978), in which it had intimated that it might, in an appropriate case in the future, bar such ex parte contacts. 647 F.2d at 1215-16.

300. 584 F.2d 519 (D.C. Cir. 1978).

301. *Id.*

302. *Id.* at 538.

303. *Id.* at 526, 536-37.

not subject to the APA's express statutory prohibition of ex parte contacts in formal rulemaking and adjudication. Nevertheless, the court noted "the inconsistency of secret ex parte contacts with the notion of a fair hearing and with the principles of fairness implicit in due process . . . ." <sup>304</sup> This denial of an opportunity for United States Lines to participate effectively in the proceeding was found "to do violence not only to [the underlying statute] but to the basic fairness concept of due process as well." <sup>305</sup> In addition, the court found that the secret contacts "foreclose[d] effective judicial review of the agency's final decision according to the arbitrary and capricious standard of the Administrative Procedure Act." <sup>306</sup>

In reaching this result, the court made clear its recognition that *Home Box Office* involved informal rulemaking and not informal adjudication as in this case. <sup>307</sup> The court's purpose, however, was not to distinguish *Home Box Office*; the point was but one step on the path to explaining why the principles of *Home Box Office* were relevant here. It said, "Moreover, however we label the proceedings involved here and in our earlier cases the common theme remains: that ex parte communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully in the decisionmaking process." <sup>308</sup>

On the relationship between its findings and *Vermont Yankee*, the court observed:

Nor is our conclusion here inconsistent with the Supreme Court's recent decision in *Vermont Yankee* . . . .

The freedom of administrative agencies to fashion their own procedures recognized in *Vermont Yankee*, however, does not encompass freedom to ignore statutory requirements . . . . Nor does *Vermont Yankee* provide a basis for agency procedures or practices which effectively foreclose judicial review where, as here, such review is provided for by statute. Nothing in that decision calls into question the well established principle, found in the Administrative Procedure Act and in the decisions of the Supreme Court, that the court is required to conduct a "searching and careful" inquiry to determine whether agency action is arbitrary or capricious, or, in appropriate cases, supported by substantial evidence . . . . <sup>309</sup>

The anomaly, of course, is that if it is so obvious that the APA does not preclude, and may even require this result, what is one to make of the extensive provision on ex parte contacts that Congress put in the APA,

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304. *Id.* at 539.

305. *Id.* at 541.

306. *Id.* at 541-42.

307. *Id.* at 539.

308. *Id.* at 540.

309. *Id.* at 542.

and limited to formal rulemaking and formal adjudication?<sup>310</sup>

Whether *Home Box Office* and its progeny should have survived *Vermont Yankee* remains an issue because they have survived. The commentators generally recognize this;<sup>311</sup> the D.C. Circuit has as well. In *United Steelworkers of America, Inc. v. Marshall*,<sup>312</sup> for example, it noted that, in *Home Box Office*, the court went beyond the strict terms of the APA and the underlying statute to ban ex parte contacts and that this position was reaffirmed in *United States Lines*.<sup>313</sup> It seems that the court will do no more than distinguish *Home Box Office* in some cases,<sup>314</sup> while extending it in others.

In his commentary before joining the bench, Judge Scalia roundly criticized the decision in *United States Lines*, believing that it "flout[ed] the Supreme Court's guidance in *Vermont Yankee* . . . , cites repeatedly . . . a virtual rogue's gallery of . . . the swashbuckling D.C. Circuit opinions . . . , and is "cause for serious professional concern."<sup>315</sup> Nothing in the subsequent judicial record suggests reason for him to conclude otherwise today.<sup>316</sup>

#### IV. AN ASSESSMENT OF THE EFFICACY OF SUPREME COURT LEADERSHIP IN JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING

Predictions that *Vermont Yankee* would not take an important place

310. *National Small Shipments Traffic Conference v. ICC*, 590 F.2d 345 (D.C. Cir. 1978) considered the ex parte contact issue in connection with an ICC investigation proceeding which it characterized as "informal rulemaking" with the additional statutory requirement of a non-adjudicatory hearing. *Id.* at 350. It found "such contacts . . . offensive in two fundamental respects: (1) they violate the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decision-making, and (2) they foreclose effective judicial review of the agency's final decision." *Id.* at 351. It turned to *Home Box Office* and *U.S. Lines* for support, *id.* at 351 n.49, and cited the latter in placing *Vermont Yankee* to the side. *Id.* at 351 n.46.

311. Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 16; DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 316-18 (1979); Preston, *supra* note 292, at 625; Stewart, *supra* note 24, at 1816-17 n.49; cf. Verkuil, *supra* note 291, at 978 (Verkuil suggests that *U.S. Lines* may be consistent with *Vermont Yankee* because it concerned informal adjudication and the APA ignores that form of administrative action, whereas *Home Box Office* involves informal rulemaking, which is expressly covered by the APA, thus making *Home Box Office* inconsistent with *Vermont Yankee*).

312. 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

313. *Id.* at 1214.

314. See *supra* text accompanying notes 294-98.

315. Scalia, *supra* note 38, at 397-99.

316. Cf. Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), *cert. granted*, 104 S. Ct. 3532 (1984). The circuit court found the Food and Drug Administration arbitrary and capricious in declining to exercise its enforcement jurisdiction to consider assertions that use of certain drugs for capital punishment violated the Federal Food, Drug, and Cosmetic Act. Judge Scalia, in dissent, said that the majority's imposition of a reasons requirement was "one of those novel procedural requirements we have been told not to invent. *Vermont Yankee* . . . ." *Id.* at 1198 n.6 (Scalia, J., dissenting).

in administrative law were incorrect. The frequency with which the lower federal courts have turned to it in the past six years alone demonstrates this. Less clear is whether the case has had the effects which the Supreme Court intended.

If, as does seem reasonably clear, the unanimous Court intended to rein in judicial activism in review of informal rulemaking in general, and the imposition of additional procedures in informal rulemaking in particular, the results are inconclusive. It has been generally effective where leadership was probably least needed — in the district courts and the courts of appeals other than the D.C. Circuit. In the latter, where the consensus seems to be that the leadership was most needed, the efficacy of the Court's leadership is more modest. Evidence of resistance to *Vermont Yankee* is both quantitatively and qualitatively greater in the D.C. Circuit than elsewhere in the lower federal judiciary.

Overall, in the area of informal rulemaking, the leadership of the Court has been moderately effective. To the extent that *Vermont Yankee*'s lead has been ineffective in establishing the intended judicial role in the review of rulemaking, the reason may be the ambiguities of the decision itself as much as perceived arrogance or intransigence in the lower federal judiciary. *Vermont Yankee* left open not only the exceptions for constitutional constraints or extremely compelling circumstances, but also the possibility of remands when "the challenged rule finds [in]sufficient justification in the administrative proceedings that it should be upheld by the reviewing court."<sup>317</sup> Although the exceptions do not appear to have been exploited to circumvent the Supreme Court's basic position, the exigencies of judicial review have been invoked in some cases with that effect.<sup>318</sup>

If the Supreme Court is inclined to implement the temper of *Vermont Yankee* effectively and fully, it must develop these issues in future cases. It is not further refinement of the exceptions for constitutional constraints or extremely compelling circumstances that is needed, however, as much as development of the precise nature of the judiciary's role in judicial review of informal rulemaking. Otherwise, the plausible and readily accessible "gap" will remain available to courts inclined to resist *Vermont Yankee*. As has been noted, refinement, by the Supreme Court, of the principles of *Vermont Yankee* has been limited to date.<sup>319</sup>

Where the leadership of *Vermont Yankee* perhaps has been most effective is in areas where it was least intended, if at all — in administrative proceedings other than informal rulemaking. In courts throughout the lower federal judiciary, the case has been cited frequently in the context of adjudicatory proceedings. Typically these courts have focused on *Vermont Yankee*'s statement that procedures beyond those mandated by

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317. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978).

318. See *supra* text accompanying notes 151-58 & 273-80.

319. See *supra* text accompanying notes 41-55.

statute are to be left to the discretion of the agencies, absent constitutional constraints or extremely compelling circumstances. The clear impression is that it has had impact in restraining judicial activism in review of administrative adjudication. The clear question is whether this was intended by the Supreme Court.

One important consideration that influenced the Supreme Court, and caused it to stress that the circumstances justifying its position that exceptions would be "extremely rare,"<sup>320</sup> was its fear that

if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted "a formula upon which opposing social and political forces have come to rest . . . , but *all the inherent advantages of informal rulemaking would be totally lost*."<sup>321</sup>

The Court was not addressing the addition of procedural requirements in adjudication. There is no indication that it desired to preserve any idea of inherent advantages of informal adjudication. Yet the invocation of *Vermont Yankee* in such cases may have that unintended effect.

This would not be especially disquieting were it not for the added dimension of the "constitutional constraints" exception that accompanies the call for judicial restraint. In rulemaking, the idea that due process is relevant only in the unusual case is traditional and unremarkable. As the D.C. Circuit observed in one case citing *Vermont Yankee*, "when a proceeding is classified as rulemaking, due process ordinarily does not demand procedures more rigorous than those provided by Congress."<sup>322</sup> It is quite correct then, to consider the "constitutional constraints" exception an "extremely rare" occurrence. In contrast, there is nothing "extremely rare" in an active concept of due process in administrative adjudication, formal or informal.

The frequent adoption of the principles of *Vermont Yankee* in adjudication cases carries with it the suspicion that the effect may be to impede the rigor of constitutional analysis in cases in which traditional notions of due process are both legitimate and due. This can be alleviated in two ways. The lower federal judiciary should be alert to the fact

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320. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

321. *Id.* at 546-47 (emphasis added).

322. *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1165-66 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

that *Vermont Yankee* focused on added procedures in rulemaking and not in adjudication; thus, it should not be taken as an added impediment to the imposition of additional procedures in adjudication on constitutional grounds.<sup>323</sup> Second, the Supreme Court should clarify its stand on the relationship between *Vermont Yankee* and administrative action beyond the sphere of administrative rulemaking.

Consequently, in both rulemaking and adjudication, the lower federal judiciary needs further guidance from the Supreme Court on the meaning of *Vermont Yankee*. One hopes that it will be forthcoming in the not too distant future.

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323. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 851-56 (E.D. Va. 1981), provides an example of an informal adjudication in which a court cognizant of *Vermont Yankee* was nonetheless uninhibited in its due process analysis.